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Supreme Court, U.S.
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No. _____

IN THE

# Supreme Court of The United States

OCTOBER TERM, 1997

JOHN NORMAN HUFFINGTON,

*Petitioner*,

v.

EUGENE NUTH, Warden and ATTORNEY GENERAL OF THE STATE OF MARYLAND,

*Respondents*.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. *Green v. Georgia*, 442 U.S. 95 (1979) and *Chambers v. Mississippi*, 410 U.S. 284 (1973), established that the Due Process Clause bars the exclusion of reliable, important defense evidence. Should this Court resolve a conflict among the circuits over whether *Green* and *Chambers* apply with equal force to evidence conceded by the prosecution to be reliable and that would dramatically impeach the key prosecution eyewitness, but would not directly "exculpate" Petitioner?

2. The Fourth Circuit applied the Sixth Amendment standard for ineffective assistance of counsel set out in *Strickland v. Washington*, 466 U.S. 668 (1984).

- Should this Court resolve a conflict among the lower courts over whether counsel may rely on prior testimony of witnesses or must conduct an independent investigation of the case?

- Did the Fourth Circuit properly excuse trial counsel's failure (i) to interview or present defense witnesses, (ii) to secure the presence of the key defense witness, and (iii) to challenge the State's circumstantial case?

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JOHN NORMAN HUFFINGTON,

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EUGENE NUTH, Warden and ATTORNEY GENERAL OF THE STATE OF MARYLAND,

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On Petition for a Writ of Certiorari
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## PETITION FOR A WRIT OF CERTIORARI

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John Norman Huffington respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

## OPINIONS BELOW

The opinion of the court of appeals, as amended by the court's order of May 7, 1988 (App., *infra*, 25a), is reported at 140 F.3d 572, and is reproduced at App., *infra*, 1a – 24a. The opinion of the district court (App., *infra*, 41a - 43a) is unreported, as is the report and recommendation of the United States Magistrate (App., *infra*, 27a - 40a), which it adopts.

## JURISDICTION

The court of appeals entered its judgment on March 31, 1998. (App., *infra*, 1a – 24a). A timely motion for rehearing and suggestion for rehearing *in banc* was denied on April 28, 1998. (App., *infra*, 44a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment VI to the United States Constitution provides that:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Section 1 of Amendment XIV to the United States Constitution provides that:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## STATEMENT

This case concerns the 1983 retrial of the Petitioner, John Huffington, for the May 25, 1981 murders of Joseph Hudson and Diane Becker, and related charges. Mr. Huffington is in the custody of the Maryland Division of Correction, and the jurisdiction of the district court was invoked under 28 U.S.C. § 2254.

### I. The 1981 Trial

In a 1981 trial, Huffington was convicted on two counts of felony murder and related charges for the Hudson and Becker killings. The jury acquitted Huffington on first-degree, premeditated murder charges. Because the State concealed the testimony of Stephen Rassa, the 1981 jury never heard Rassa's critical testimony that the State's star witness, Deno Kanaras, had actually planned the murders days in advance in order to rob the victims. The Maryland Court of Appeals reversed the convictions on grounds not relevant here and remanded for a new trial. *Huffington v. State*, 452 A.2d 1211 (Md. 1982).[1]

### II. The 1983 Retrial at Issue Here

Before retrial in 1983, Huffington learned that Stephen Rassa had testified in Kanaras' trial in 1982. Huffington's counsel made an ineffectual, late attempt to subpoena Rassa for the retrial, but never found him.

In the 1983 retrial, the State again relied primarily upon Kanaras, who himself had been convicted of felony murder and related offenses for the same incidents at issue here. *See Kanaras v. State*, 460 A.2d 61 (Md.), *cert. denied*, 297 Md. 109 (1983). Although Huffington has consistently maintained

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[1] While that appeal was pending, Huffington filed a petition for a writ of habeas corpus in the U.S. District Court for the District of Maryland. This was denied, as was an application to the U.S. Court of Appeals for the Fourth Circuit for a certificate of probable cause. Before the retrial, Huffington filed a motion to dismiss on double jeopardy grounds, the denial of which was affirmed by the Maryland Court of Appeals. *Huffington v. State*, 486 A.2d 200 (Md. 1985).

that he was not present when Kanaras committed these crimes, Kanaras repeated his fantastic claim that he was Huffington's hostage during the killings. Kanaras provided the State's essential direct evidence that Huffington was also present then.

### A. The Prosecution's Star Witness

Kanaras testified that on May 24, 1981, he called Huffington to buy some cocaine, but Huffington had none. Kanaras said he drove Huffington to the Club Golden Forty where they found Hudson, from whom Kanaras had bought cocaine "about a dozen times," and Becker, Hudson's girlfriend. According to Kanaras, Huffington arranged for a cocaine purchase that night at Hudson's trailer. At the trailer, Kanaras said, Huffington volunteered to help Hudson with his cocaine trafficking. (A0659-68, A0709, A0714).

Later that evening, according to Kanaras, Huffington (who had no car) convinced Kanaras to return to Hudson's trailer. After waking Hudson, Kanaras said, all three drove to a rural area. After they exited the car, Kanaras continued, Huffington unexpectedly produced a gun, shot Hudson, and placed a plastic bag of cocaine from Hudson's pocket into a Marlboro cigarette box. (A0669-77, A0746-47, A0855).

Kanaras claimed that Huffington ordered him at gunpoint to drive back to the trailer, where Huffington forced him to exit the car and enter the trailer. Inside, Huffington supposedly stole some money, struck the sleeping Becker with a liquor bottle, and repeatedly stabbed her with a knife produced from his boot. After silently watching these events, Kanaras claimed that he "raced" the 300 feet back to the car. Before Kanaras opened his unlocked car door, Huffington supposedly overtook his hostage while carrying a gun, the bottle, the knife, a note Hudson had left in the trailer, and Becker's purse. (A0677-83, A0688).

Kanaras claimed he was ordered to drive back to Huffington's apartment, where Huffington cleaned up, forced over eight hundred dollars on Kanara, and gathered incriminating evidence. Kanaras said Huffington then compelled him to

drive around for two hours, burning some evidence and tossing the rest into wooded areas and streams. The then-unarmed Huffington purportedly ordered Kanaras to drive to a fiddler's convention. Kanaras then drove Huffington to Huffington's parents' house, where Kanaras waited in his car while Huffington went inside. Kanaras next drove Huffington to Hall's Furniture Store, where Huffington allegedly disposed of his pants in a dumpster. Shortly after noon, Kanaras went home. (A0683-95, A0765-75). *Compare* 140 F.3d at 576-77 (quoting summary of Kanaras' testimony from Huffington's *first* trial).

Later that day, after police investigators found Hudson and Becker, they confronted Kanaras and found his car freshly washed and vacuumed. Kanaras denied any involvement in the murders. Kanaras later changed his story and accused Huffington. Kanaras led officers to locations where he had left evidence of the crimes, recovering a vodka bottle, a ten-inch long knife and sheath, a gun, several bullets, and a pair of pants. (A0286-90, A0392, A0398-99, A0696-700). Kanaras admitted that he had owned the gun used to kill Hudson, but claimed he sold it to Huffington five weeks before the shooting. (A0655-56). Kanaras told the jury that the murders were Huffington's idea and that Huffington supplied the knife and gun. (A0655-56, A0674-82).

In a pre-arrest interview with police, Huffington said he and Kanaras had gone to the Golden Forty, where they met Hudson and Becker. Kanaras and Huffington followed Hudson and Becker to their motor home, bought some marijuana and later went to the fiddler's convention. (A0555-57). He denied involvement in the murders.

The police recovered boots from Kanaras and Huffington. Kanaras' boots contained multiple spots of human blood, some at the top inside portion of his right boot. Huffington's boots contained a small spot of possible animal blood on the outside. The police retrieved from Huffington's apartment a bottle of bleach and a Marlboro cigarette box containing cocaine. The State also presented James Brineger,

who claimed he saw Huffington with the gun earlier in the weekend, and the prior testimony of Kim Bognani, Huffington's former girlfriend, that Huffington had pants like those found in the dumpster, was thought to have a gun allegedly obtained from Kanaras, had some cocaine in a Marlboro box on the evening of May 25, and talked then about going to Florida (revisiting Bognani's suggestion that they go away somewhere). The police seized clothing that Kanaras purportedly wore on the night of the murders, but it had been washed. (A0416-17, A0475-79, A0536-37, A0580-90, A0700); 140 F.3d at 578-79.

### B. The Defense Evidence the Jury Never Heard

#### 1. Stephen Rassa

Huffington's jury never heard the crucial testimony of Stephen Rassa. Rassa would have shown that a few days before the killings Kanaras had the plan, motive, and murder weapons.

#### a. Rassa's Prior Testimony: The Transcript

Rassa testified as a rebuttal witness against Kanaras. Rassa stated that on May 20, 1981, he and Kanaras tried to sell jewelry and purchase drugs; that Kanaras had substantial drug dealings with Joe Hudson and owed Hudson money; that as Rassa and Kanaras approached the Hudson/Becker trailer, Kanaras reached under his car seat for a gun and pointed out a knife in the glove compartment; that Rassa believed that Kanaras intended to rob and kill Hudson; and that he dissuaded Kanaras from that plan. (A0023-0035).

At the *Kanaras* trial, Rassa was exhaustively cross-examined by Kanaras' counsel, who suggested that Rassa was heavily involved with drugs, unable to hold a job, and largely homeless. Rassa also was cross-examined on inconsistencies between his trial testimony and prior statements to the police. (A0036-A0067, A0086-0138).

But the State has never questioned Rassa's veracity. (A1172-80). During the *Kanaras* trial the prosecution stated,

"We believe [Rassa's] story has enough verifying details that he is credible," noting that he passed a polygraph examination. (A0072-73, A0077). Rassa also made contemporaneous consistent statements to Paul Vela, a friend. (A1299-304). During Huffington's trial, the prosecution sought to have Kanaras called as the court's witness, explaining that Kanaras would probably lie. (A0596-97).

At Huffington's trial, Kanaras denied telling Rassa that he intended to rob and kill Hudson, or that Rassa had to dissuade him. Huffington then sought to introduce a transcript of Rassa's prior testimony. Huffington proffered, without contradiction, that Rassa was unavailable. (A0784, A0805-06); *see also Huffington v. State*, 500 A.2d 272, 275 (Md. 1985), *cert. denied*, 478 U.S. 1023 (1986). The trial court excluded the Rassa transcript, ruling that even though the State had sponsored Rassa's testimony at Kanaras' trial, the State had not had an adequate opportunity to cross-examine him.[2] (App., *infra*, 45a – 47a).

**b. Rassa's Potential Live Testimony**

Huffington's 1983 jury also never heard Rassa's live testimony. Although Huffington's counsel had the transcript of the *Kanaras* trial, he made no effort to locate Rassa until the first day of jury selection. An investigator then spent a few hours unsuccessfully looking for Rassa. (A0988-0990, A0992-94, A1041-42).

While preparing for the post-conviction hearing in 1987, an investigator located Rassa within an hour of learning, through routine inquiries of Rassa's family, that he lived in California. Rassa was traced through the California registry of motor vehicles. (E0028-30). During the 1983 retrial,

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[2] In contrast to the extensive cross-examination of Rassa by Kanaras' lawyer, the State -- when given a full opportunity at Huffington's State post-conviction hearing -- questioned him in only a cursory fashion. (A1172-80).

Rassa was similarly living in California, and also held an I.D. from the registry of motor vehicles. (A1174).

### 2. Testimony From Other Witnesses

Several other witnesses -- most of whom testified for the State in *Kanaras* (*see* A1508) -- would have revealed Kanaras' lies and undercut supposedly corroborating evidence. Huffington's counsel, however, interviewed no fact witnesses and engaged no investigator before the 1983 retrial. (A0987, A1034-35, A1058-59; *see* E0006). Six weeks before trial, the nineteen-year-old Huffington sent counsel a list of twenty-eight potential witnesses, instructing him to contact "each and every one of them." (E0004-05; A1030, A1034; *see also* A1506). Trial counsel contacted only two people named in the letter, and then only after trial began as potential character witnesses. (A1034-35, A1341-42).

The evidence thus lost to Huffington included: testimony from **Thomas Wagner** that Kanaras was "very hot" for cocaine and obsessed with money; that the murder gun was in Kanaras' hands *after* Kanaras claimed to have sold the gun to Huffington; that in April 1981 Kanaras carried an 8-to-10-inch hunting knife (just like the murder knife) in his boot (where a human bloodstain was found); and that Kanaras, on his way to a meeting with Hudson, tried to enlist Wagner to "strong-arm" someone at the Golden Forty for drug money (A1220-21, A1223-27); testimony from **State Trooper Aschenbach** that Kanaras was deeply involved in drugs and desperate for money at the time of the killings; that he carried a gun; and that he was predisposed to violence (A1203-09); testimony from **William Palmisano**, Huffington's former roommate, that would have refuted the slim corroboration for Kanaras' claim that Huffington owned the murder knife (A1182-84); testimony from **Thomas Hall** that would have refuted Kanaras' claim that Huffington disposed of the pants at Hall's Furniture Store (A1340-41); and testimony from John Huffington's father that on the morning after the killings, while supposedly a hostage in thrall to his captor,

Kanaras lounged in his car for upwards of 45 minutes, waiting for John to leave his family residence. (A0957-58).

### 3. The Flaws in the State's Circumstantial Case

The State presented physical evidence which trial counsel failed to challenge. An FBI agent had performed a chemical analysis of bullets fired at Hudson and shells retrieved by officers searching under Kanaras' instructions. The agent claimed to have made a three-point chemical comparison, and the prosecutor began his summation by telling the jury it could infer "that the bullets came from the same box." (A0465-67; A0853-54).

Because trial counsel never checked, the jury never learned that this analysis was deeply flawed. (A1037). At the post-conviction hearing the scientist who invented the analysis used by the FBI testified that the agent's data did not support his conclusions because two of the agent's three points of supposed comparison were invalid, and a proper match requires at least three comparison points. (A1274, A1281-85, A1289, A1292, A1451; *see* A1463-64). The FBI agent then changed his story, falsely claiming at the post-conviction hearing that he had based his original conclusions on a two point match. (*Compare* A1460, A1459, A1467 *with* A0459, A0462-63.)

Another FBI agent testified about the analysis of two hairs found in the garter belt of Diane Becker. He stated that, upon microscopic examination, characteristics of those hairs were consistent with Huffington's. (A0384). Huffington's trial counsel failed to establish that the FBI did not compare the garter-belt hairs with hair from Ms. Becker,[3] so the State could not rule out that the hairs were hers.

Neither the gun nor the knife contained any identifiable fingerprints. (A0487). The State presented FBI testimony

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[3] The hair expert's testimony was based on his *visual* review of a *photograph* of Ms. Becker's hair. (A0385).

that the vodka bottle had a single print matching Huffington's right index finger. (A0489-90). Trial counsel, however, never established that the State's expert could not determine when this print was made. Because Huffington had told police he was at the trailer earlier that evening (A0556), the jury could have concluded that the print dated from that earlier visit. Trial counsel argued as much in closing (A0865-66), but failed to obtain testimony supporting his argument.

### C. Trial Counsel's Strategy

Huffington's trial counsel waived opening statement and presented no witnesses. (A0808, A1558). He never claimed that he made tactical decisions not to investigate the case or not to present a defense: his stated goal was to "tear apart the State's case, piece by piece . . .." (A1029). Nevertheless, Huffington was convicted of felony murder by a jury unaware of crucial evidence supporting his defense and devastating Kanaras' story. On May 1, 1984, he was sentenced to death.

## III. Direct Appeal

On direct appeal, Huffington contended that the trial court erred in refusing to admit the Rassa transcript. The state appeals court affirmed the convictions by a 4-3 vote, on the ground that the State did not cross-examine Rassa. *Huffington*, 500 A.2d 272. (App., *infra*, 48a – 93a). The constitutional significance of excluding Rassa's transcript was addressed only by the dissenting Justices, who concluded that Rassa's testimony was critical to Huffington's defense, and that its admission was required "to afford the defendant due process of law." 500 A.2d at 293, 295 (McAuliffe, J., dissenting) (emphasis added):

> Rassa directly contradicted Kanaras' testimony that he had not been to the Hudson trailer on May 20th, that he had not had a gun on that date, and that he had not discussed robbing Hudson at that time. Furthermore, if the jury believed that Kanaras was contemplating a robbery of Hudson just five days before the robbery and murders occurred, and was

> discussing with Rassa the possible use of the very types of weapons actually thereafter used, the jury would most likely refuse to believe Kanaras' protestations of being an innocent pawn in the hands of Huffington. Rassa's evidence permitted a reasonable inference that Kanaras had been a principal actor in the robbery and murder, and such evidence may well have created a reasonable doubt in the minds of the jurors that Huffington was the actual killer.

Under Maryland law, Huffington could not raise on direct appeal the claim of ineffective assistance of counsel. *Johnson v. State*, 439 A.2d 542, 559 (Md. 1982).

## IV. State Post-Conviction Proceedings: Vacating the Death Sentence

On March 9, 1987, Huffington filed a Petition for Post-Conviction Relief in the Circuit Court for Frederick County, Maryland, which included the grounds for relief addressed in this Petition. In May 1988, twenty-one witnesses testified at a four-day hearing on that petition. In a ruling announced almost three years later, the court vacated the death sentences in light of *Mills v. Maryland*, 486 U.S. 367 (1988), but denied further relief. The state court's order provided no real discussion of Huffington's claims. (App., *infra*, 94a – 110a).

On February 7, 1991, Huffington filed an Application for Leave to Appeal from the Partial Denial of Post-Conviction Relief in a Capital Case. The Maryland Court of Appeals denied that application (App., *infra*, 111a) and a motion for reconsideration. His petition for certiorari to this Court, challenging on equal protection grounds the lack of state appellate review of his ineffective assistance claim, was denied. *Huffington v. Maryland*, 502 U.S. 985 (1991).

## V. Resentencing and Second State Post-Conviction Petition

On April 28, 1992, Huffington was resentenced to two consecutive life terms plus 18 years. On September 18, 1992, Huffington filed in state court a Second Petition for Post-Conviction Relief, challenging Maryland's denial of appellate review of his ineffective assistance claim. That petition was summarily denied on December 1, 1992.

Ruling on Huffington's Application for Leave to Appeal, the Maryland Court of Special Appeals remanded "for the preparation of a statement of reasons." Seven months later, the trial court again denied the Second Petition but enumerated no reason, stating that it "is not in a position to address or remedy" the claim for appellate review. On July 15, 1994, the Court of Special Appeals denied leave to appeal.

## VI. The Federal Petition for a Writ of Habeas Corpus

On November 3, 1994, Huffington filed with the U.S. District Court for the District of Maryland an Application for a Writ of Habeas Corpus under 28 U.S.C. § 2254, raising the two issues addressed in this Petition. No hearing was ever held on his application.

On February 27, 1996 a magistrate recommended denial of Huffington's claim in an error-filled Report and Recommendation. (App., *infra*, 27a –40a). Pursuant to Fed. R. Civ. P. 72, Huffington timely filed Objections. Eight months later, the district court acknowledged the magistrate's fundamental "misunderstanding" of Huffington's defense, yet adopted the Report. (App., *infra*, 41a –43a).

Huffington filed a Notice of Appeal to the U.S. Court of Appeals for the Fourth Circuit on December 18, 1996 (A1716), along with an Application for a Certificate of Appealability. On August 29, 1997, that court granted a Certificate of Probable Cause and ordered briefing and oral argument. (A1719). On March 31, 1998, the Fourth Circuit affirmed the denial of the writ. (App., *infra*, 1a – 24a).

The Fourth Circuit held that the exclusion of the Rassa transcript did not violate the due process principles announced in *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973), and *Green v. Georgia*, 442 U.S. 95, 97 (1979) (per curiam). Both *Chambers* and *Green* reversed, on due process grounds, evidentiary rulings that excluded key defense evidence. The Fourth Circuit did not apply those principles because (i) the Rassa transcript was "impeachment" evidence rather than "exculpatory," and therefore was not sufficiently "vital"; and (ii) it did not meet the Fourth Circuit's requirements for "reliability." 140 F.3d at 584-85.

The Fourth Circuit also rejected Huffington's claim of ineffective assistance under *Strickland v. Washington*, 466 U.S. 668 (1984). 140 F.3d at 579-583. The court of appeals excused trial counsel's failure to locate Rassa for trial, to interview or present any defense witnesses, and to challenge the government's forensic evidence.

Huffington timely filed a Petition for Rehearing and Suggestion for Rehearing In Banc, which was denied on April 28, 1998. (App., *infra*, 44a). The Fourth Circuit then revised its original opinion to correct some of the errors pointed out by Huffington's Petition. (App., *infra*, 25a).

## REASONS FOR GRANTING THE PETITION

### I. The Fourth Circuit, In Conflict with Other Circuits, Derogated Impeachment Evidence Under *Chambers* and *Green*

*Chambers* and *Green* established that the Due Process Clause prohibits the "mechanistic" application of evidentiary rules to deprive criminal defendants of important defense evidence bearing "persuasive assurances of trustworthiness." Excluding such evidence denies a fair trial. 410 U.S. at 302; 442 U.S. at 97.

The Fourth Circuit drew from *Chambers* and *Green* the broad requirements that:

> [1] the evidence is 'highly relevant to a critical issue' in the case, *Green*, 442 U.S. at 97, 99 S.Ct. at 2151, and [2] sufficient indicia of reliability exist. *See id.*; *Chambers*, 410 U.S. at 302, 93 S.Ct. at 1049.

140 F.3d at 584. The Fourth Circuit fundamentally misapplied these requirements, creating a "vitality" test that conflicts with other circuits, and a heightened "reliability" standard that undermines *Chambers* and *Green*.

### A. The Fourth Circuit Incorrectly Discounted "Impeachment" Evidence Because it is not Directly "Exculpatory"

In analyzing whether the Rassa transcript was "highly relevant to a critical issue," the Fourth Circuit did not dispute its substance:

> The transcript of Rassa's testimony would have revealed to the jury that on May 20, 1981, Rassa and Kanaras approached the Hudson-Becker trailer together; Kanaras reached for a gun and a knife; Rassa was convinced that Kanaras intended to rob and kill Hudson; and Rassa had to dissuade Kanaras from carrying the weapons into the trailer. Rassa's prior testimony would also have informed the jury of Kanaras' prior drug debts to Hudson.

140 F.3d at 584 (quoting Brief of Petitioner at 39). (*See also* A0023-A0035). Even though this evidence directly contradicted Kanaras, the Fourth Circuit found it not "as compelling as Huffington suggests." 140 F.3d at 584.

The Fourth Circuit thus squarely disagreed with the three Maryland justices dissenting in *Huffington*, 500 A.2d at 290-95,

on the significance of the excluded Rassa transcript,[4] questioning its "vitality" as evidence:

> [U]nlike the testimony at issue in *Chambers* and *Green*, Rassa's testimony does not "*directly affect*[] the ascertainment of guilt." Rather, it is "far more attenuated" in its connection to Huffington's guilt or innocence. Rassa's testimony *does not tend to exculpate* Huffington as the testimony in *Chambers* and *Green* did. *Instead*, to the extent it would have any effect, *it would work to impeach the credibility of Kanaras' testimony regarding his role in the crimes*.

140 F.3d at 585 (citations omitted, emphasis added). The Fourth Circuit thus dismissed this evidence as "impeachment," as opposed to directly "exculpatory" evidence. The Fourth Circuit attempted to limit the sweep of this ruling, stating that "[w]e do not hold here that *only* direct, exculpatory -- as opposed to impeachment -- evidence satisfies the *Chambers* and *Green* requirements." 140 F.3d at 585 (emphasis added). Still, the panel's only complaint about the "vitality" of the Rassa transcript was that it was "impeachment" evidence, rather than directly "exculpatory." *Id.*[5] That ruling, which is consistent with the

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[4] Ironically, the other four justices of the Maryland Court tacitly acknowledged the crucial nature of Rassa's testimony by excluding it based on the State's purported need to cross-examine him. *Id.* at 274-79.

[5] The Fourth Circuit emphasized its reliance on this false "impeachment"/"exculpatory" dichotomy by complaining that "Huffington does not cite a single case in which any court has applied the *Chambers* and *Green* analysis to hold that the exclusion of impeachment evidence violated the Due Process Clause." *Id.* The opinion concedes that Huffington *did* cite precedent holding that due process analysis is not determined by whether evidence is denominated "exculpatory" or "inculpatory." *See* 140 F.3d 585 (acknowledging *Giglio v. United States*, 405 U.S. 150, 154-55 (1972)). In his Petition for Rehearing, Huffington directed the court of appeals to conflicting Second Circuit opinions. (*See* Petition for Rehearing and Suggestion for Rehearing In Banc, dated April 13, 1998, at 13-14).

application of *Chambers* and *Green* by the California Supreme Court,[6] unjustifiably limits *Chambers* and *Green* and conflicts with the holdings of two other Circuits.

In *Rosario v. Kuhlman*, 658 F.Supp. 1408, 1409, 1410 (S.D.N.Y. 1987), *aff'd*, 839 F.2d 918 (2d Cir. 1988), the State's "key witness," Victor Cartagena, claimed that he observed the charged crimes while on an errand with his housemate/girlfriend. The trial court excluded testimony impeaching Cartagena's claim that he was living with (or even knew) the girlfriend at the time of the crimes. *Id.* at 1411-13. Applying *Chambers*, the federal *habeas* court held that exclusion of this testimony, which "tended to cast doubt on Cartagena's veracity" (*id.* at 1409), "denied petitioner the right to present highly relevant and probative evidence in violation of the Sixth and Fourteenth Amendments . . ." *Id.* at 1413-15. The Second Circuit agreed, emphasizing the importance of evidence impeaching the prosecution case. *E.g.*, 839 F.2d at 927. *See Gilmore v. Henderson*, 825 F.2d 663 (2d Cir. 1987) (exclusion of evidence impeaching witness *other than* "the prosecution's primary witness," along with evidence bolstering defendant's explanation for fleeing police, violated due process); *Justice v. Hoke*, 90 F.3d 43 (2d Cir. 1996) (granting writ because exclusion of impeachment evidence violated due process).

The Fourth Circuit's holding also conflicts with rulings of the Ninth Circuit. In *United States v. Benveniste*, 564 F.2d 335 (9th Cir. 1977), the Ninth Circuit found a due process violation "analogous" to *Chambers* in the exclusion of hearsay statements that would have "raised questions about [the informant's] credibility by directly contradicting her testimony" and "corroborate[d]" the defendant's testimony supporting his

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[6] *People v. Hawthorne*, 841 P.2d 118 (Cal. 1992), *cert. denied*, 510 U.S. 1013 (1993), upheld the trial court's refusal to allow impeachment of a prosecution eyewitness with prior inconsistent statements showing the "suggestive" nature of police identification procedures. The evidence, *Hawthorne* held, had limited "exculpatory value" because it did not "directly impugn[]" the witness' identification.

defense of entrapment. 564 F.2d at 340-42. Without this impeachment evidence, the defendant's "case was 'far less persuasive than it might have been.'" *Id.* at 342 (*quoting Chambers*, 410 U.S. at 294). *See also Sims v. Oku*, No. 92-15136, 1992 U.S. App. LEXIS 32324 (9th Cir. Nov. 23, 1992) (unpublished) (exclusion of evidence contradicting key prosecution witness on important detail violated due process).[7]

Some state courts recognize the vitality of impeachment evidence in a *Chambers* analysis. *State v. Torres*, 556 A.2d 1013, 1020 (Conn. 1989) (by denying use of "inconsistent statements to challenge the credibility of the key witness, the trial court denied the defendant the opportunity to confront the witnesses against him"). *See also Commonwealth v. Bohannon*, 434 N.E.2d 163, 174 (Mass. 1982) (statements impeaching complainant, "although not per se exculpatory," were "important" and "central to the defendant's case," but reliability test of *Chambers* not met).

The Fourth Circuit attempted to distinguish cases stressing the importance of impeachment evidence, arguing that they "concern denial of due process where the government suppressed or concealed the impeachment evidence." 140 F.3d at 585. But there is no logical basis for recognizing the

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[7] The Sixth Circuit's rulings on this issue have been mixed. *United States v. Burge*, 990 F.2d 244 (6th Cir. 1992), *cert. denied*, 508 U.S. 924 (1993), endorsed the Second Circuit's *Rosario* analysis, but held that exclusion of the specific impeachment evidence at issue did not violate due process. *Burge* discounted that evidence precisely because it "*would not*, in any significant way, reflect on the credibility" of the witnesses at "[t]he heart of the government's case." *Id.* at 248-49 (emphasis added). In an earlier ruling, however, the Sixth Circuit appeared to take the Fourth Circuit's view that improper exclusion of impeachment evidence does not violate the Due Process Clause. *Davis v. Jabe*, 824 F.2d 483, 485-87 (6th Cir.), *cert. denied*, 484 U.S. 988 (1987). The Fourth Circuit sought support below from the Sixth Circuit's decision in *Turpin v. Kassulke*, 26 F.3d 1392 (6th Cir. 1994), *cert. denied*, 513 U.S. 1118 (1995), but the *Turpin* Court did not reject (or even consider) "impeachment" evidence, as opposed to directly "exculpatory" evidence.

importance of impeachment evidence when it is concealed by a prosecutor, but not when it is erroneously excluded by a judge.

This Court has explained that impeachment evidence can be just as vital as directly exculpatory evidence. *Napue v. Illinois*, 360 U.S. 264, 269 (1959), observed that:

> The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend.

*See also Kyles v. Whitley*, 514 U.S. 419, 1565, 1571 (1995) ("In . . . *United States v. Bagley*, 473 U.S. 667 . . . (1985), the Court disavowed any difference between exculpatory and impeachment evidence for *Brady* purposes"); *Giglio*, 405 U.S. at 154-55 ("the Government's case depended almost entirely on Taliento's testimony; without it there could have been no indictment and no evidence to carry the case to the jury. Taliento's credibility as a witness was therefore an important issue in the case").

The Fourth Circuit's distinction between impeachment and exculpatory evidence would erode the Due Process Clause. As recognized in *Giglio*, a criminal defendant's burden is not to prove innocence, but to show the State's failure to prove guilt beyond a reasonable doubt. The defendant need not present exculpatory evidence. Effective impeachment of the prosecution's case should bring acquittal. If the court excludes needed impeachment evidence, the trial is not fair.

### B. The Fourth Circuit's "Reliability" Holding Will Undermine *Chambers* and *Green*

The Fourth Circuit also found that the Rassa transcript lacked "the reliability required" by *Green* and *Chambers*. In so doing, the Fourth Circuit imposed an unrealistically high test for "reliability" that departs sharply from *Green* and *Chambers*.

In *Chambers*, the exclusion of key testimony violated due process even though the witness later *recanted* the statement that the defendant wished to introduce. 410 U.S. at 288. Recanted statements are always subject to question, but this Court found the statement sufficiently reliable that the Due Process Clause ensured its presentation at trial. In contrast, Stephen Rassa has repeatedly given the same testimony about Kanaras and his plan to rob and kill Hudson and Becker.

The Rassa testimony compares equally well to the testimony at issue in *Green*, 442 U.S. at 97 (emphasis added):

| Statement in *Green* | Rassa Testimony |
|---|---|
| (1) "Moore made his statement spontaneously to a close friend." | (1) Rassa made a consistent statement spontaneously to a close friend, Paul Vela, and has continued to make consistent statements to the police, at the *Kanaras* trial, and at the post-conviction hearing. |
| (2) "The evidence corroborating the confession was ample, and indeed sufficient to procure a conviction of Moore . . .." | (2) The Rassa testimony was amply corroborated by other evidence, as the prosecutors themselves have stated (A0072-73 ("We believe his story has enough verifying details that he is credible")). His testimony convicted Kanaras of murder. |
| (3) "The statement was against interest, and there was no reason to believe that Moore had any ulterior motive in making it." | (3) The same is true for Rassa. |

| | |
|---|---|
| (4) "*Perhaps most important*, the State considered the testimony sufficiently reliable to use it against Moore . . .." | (4) The State relied heavily upon Rassa in securing the convictions of Kanaras, and has repeatedly attested to Rassa's credibility. |

In misapplying *Chambers* and *Green*, the Fourth Circuit acknowledged that the Rassa transcript bore numerous indicia of reliability:

> [1] Rassa testified under oath at Kanaras' trial; [2] the State credited his testimony, offering Rassa as a witness at that time; [3] Kanaras' attorney subjected Rassa to extensive cross examination; and [4] Rassa made a consistent corroborative statement to a friend, Paul Vela.

140 F.3d 584. But the Fourth Circuit listed five cavils about Rassa's reliability: (1) "Rassa testified that *he*, not Kanaras, first brought up the subject of robbing Hudson, and that he lied to the police about this detail"; (2) Rassa was a drug user; (3) Rassa's statement to Vela did not contain all of the details in his sworn testimony and was made as the two friends heard a news report of the murders; (4) Rassa "told his story to the police in part because he feared Kanaras would implicate him"; and (5) "Rassa's statement to the police was not against his penal interest." *Id.*

These cavils ignore the teachings of *Green* and *Chambers*, and rest on a fundamental error. Despite Rassa's drug use, the State sponsored his testimony, and explicitly vouched for it. (A0072-73.) Indeed, the State sought to have Kanaras called as the court's witness at Huffington's retrial because the State credited Rassa over Kanaras. (A0596-97). With both Huffington and the State agreeing that Rassa was reliable, the Fourth Circuit's pronouncement to the contrary is insupportable. In fact, substantial evidence corroborates Rassa. (A1203-05; A1223-25 (Kanaras' prior attempt to enlist help to "strong-arm" customers for drug debts as he

drove to meet Hudson); A1220-26 (Kanaras' possession of the murder gun and knife); A1206-07 (Kanaras kept gun under car seat and brought it to drug transactions)).

Moreover, Rassa testified against Kanaras despite intimidation which included threats from the thirty-odd members of Kanaras' family. (A0108-09; *see* A0051 (prosecutor states, "It has always been an extreme concern. . . that he [Rassa] was going to be physically harmed by members of the Kanaras family"). The Fourth Circuit's assertion that Rassa's testimony was not "against his penal interest" is baffling. Rassa testified about drug use and participation in drug transactions, both highly incriminating. (*E.g.*, A0028-31, A0086-90, A0121-22). Rassa did deny involvement in the killings, but no evidence tied him to those crimes.[8]

If testimony that the prosecution vouches for is not "reliable" under *Chambers* and *Green*, then those cases have no meaning.

## II. The Fourth Circuit's Application of *Strickland* Conflicts with the Requirement that Defense Counsel Investigate His Case and Present a Defense

The Sixth Amendment "right to counsel is a fundamental right of criminal defendants; it assures the fairness, and thus the legitimacy, of our adversary process," *Kimmelman v. Morrison*, 477 U.S. 365, 374 (1986), and includes the right to counsel's "effective" assistance. *Cuyler v. Sullivan*, 446 U.S. 335, 352 (1980). Counsel is constitutionally ineffective when his performance falls below an "objective standard of reasonableness"

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[8] To address a detail that the court of appeals both misunderstood and inflated into a larger consideration, Rassa was *not* the first to bring up with Kanaras the possibility of robbing Hudson. About two weeks before the killings, Kanaras proposed to Rassa that they rob Hudson's trailer, but Rassa talked Kanaras out of the proposed crime. (A0031-33, A1148-49.) When riding to Hudson's trailer *several days later* on May 20 (a few days before Kanaras committed the murders), Rassa brought up the question of robbery because "I wanted to make sure that he [Kanaras] wasn't still thinking about robbing them . . .." (A1151; *see* A0120).

and when this deficient performance creates "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 687-88, 694. The Fourth Circuit's application of these standards conflicts with those of other courts.

### A. The Holding that Counsel may Rely on Prior Testimony Rather than Conduct an Independent Investigation Reflects a Broad Conflict in the Lower Courts

The decision below highlights a disagreement among the lower courts about whether defense counsel may rely on a witness' prior testimony or statements, or must investigate witnesses himself. The Fourth Circuit suggested that trial counsel did not need to interview various potential witnesses, such as Rassa, Thomas Wagner, Trooper Aschenbach, Thomas Hall, or Norris Huffington, because he had transcripts of their testimony from the *Kanaras* trial. 140 F.3d at 580; *see also Turner v. Williams*, 35 F.3d 872, 898 (4th Cir. 1994) (excusing failure to interview because prosecutor told defense counsel "the substance of the witnesses' anticipated testimony"), *overruled in part on other grounds*, *O'Dell v. Netherland*, 95 F.3d 1214 (4th Cir. 1995), *aff'd*, __ U.S. __, 117 S.Ct. 1969 (1997). The Ninth Circuit holds a similar view, *see Eggleston v. United States*, 798 F.2d 374, 376 (9th Cir. 1986) (failure to interview acceptable because counsel had access to "witness interviews and statements taken by the government"), and decisions of the Sixth Circuit and Montana's Supreme Court suggest their agreement. *Crawford v. Livesay*, No. 85-5725, 1986 U.S. App. LEXIS 32921 (6th Cir. Oct. 30, 1986) (per curiam) (unpublished) (approving failure to interview doctor where "counsel were in possession of [doctor's] report and [doctor] testified from that report"); *State v. Thomas*, 946 P.2d 140, 144 (Mont. 1997) (counsel not ineffective for failing to interview witness where he reviewed witness statement).

In contrast, numerous courts hold that, even if the witness' prior testimony is known, counsel must interview

that witness. In *Chambers v. Armontrout*, 907 F.2d 825, 828-830 (8th Cir.), *cert. denied*, 498 U.S. 950 (1990), the Eighth Circuit ruled that counsel was ineffective because he relied on his reading of a critical witness' prior testimony, rather than interviewing the witness. *See also Thomas v. Lockhart*, 738 F.2d 304, 308 (8th Cir. 1984) (review of prosecution's file not an adequate investigation). The Fifth and Seventh Circuits have similarly found counsel ineffective for relying upon prior witness statements, and not conducting their own interviews. *Bryant v. Scott*, 28 F.3d 1411 (5th Cir. 1994) (counsel ineffective for "restrict[ing] his pretrial investigation to discussions with [defendant], review of the indictment . . . and examination of the prosecutor's file. [Counsel] should have interviewed the eyewitnesses."); *Crisp v. Duckworth*, 743 F.2d 580, 584 (7th Cir. 1984) (although not prejudicial, counsel erred in relying upon police statements and preliminary hearing transcript rather than interviewing witnesses), *cert. denied*, 469 U.S. 1226 (1985).

The supreme or penultimate courts of at least five states also require that counsel must conduct an independent investigation, even if counsel has access to witness statements or to reports or investigations of others. *People v. Ledesma*, 729 P.2d 839, 861 (Cal. 1987) (in bank) (counsel ineffective who had "read the preliminary hearing transcript," "reviewed the materials that the prosecution produced," "reviewed some . . . materials in the public defender's report," "interviewed defendant," and obtained a psychiatric report); *Commonwealth v. Baxter*, 640 A.2d 1271 (Pa. 1994) (counsel ineffective for relying on discovery request: "the prosecution's file is not a substitute for an independent investigation by defense counsel" (internal quotation omitted)); *Yarbrough v. State*, 529 So.2d 659, 662 (Miss. 1988) ("no independent investigation . . . was carried out by Yarbrough's trial attorney; counsel relied on whatever materials the state brought to trial"); *State v. Moorman*, 358 S.E.2d 502 (N.C. 1987) (counsel deficient where he "did little more than read the police report and meet several potential witnesses"); *Butler v. State*, 716 S.W.2d 48 (Tex. Ct. App. 1986) (en banc) (counsel deficient for failure to investigate, *inter alia*, witness who saw someone else

leaving crime scene, "rel[ying] instead on the report given him by the assistant district attorney that [the witness] could not identify the man he had seen").

The Court should resolve this conflict. The Sixth Amendment guarantees an attorney who brings his own professional judgment to bear in investigating and developing a defense, not one who abdicates this task to others. Counsel's active and effective efforts in preparing a defense are "critical to the ability of the adversarial system to produce just results." *Strickland*, 466 U.S. at 685. By permitting counsel to rest upon the case as he found it, the Fourth Circuit's holding turned the Sixth Amendment's crucible of "adversarial testing," *id.*, into a cold mockery.

### B. The Fourth Circuit's Application of the Sixth Amendment is Inconsistent with *Strickland* and Threatens the Fairness of Criminal Trials

The Fourth Circuit's ruling below also ignores the basic principle that trial counsel, at a minimum, must conduct a pretrial investigation and present the available defenses. The trial "testing process generally will not function properly unless defense counsel has done some investigation into the prosecution's case and into various defense strategies, [and] 'counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.'" *Kimmelman*, 477 U.S. at 384 (quoting *Strickland*, 466 U.S. at 691). By excusing trial counsel's complete lack of investigation here, the Fourth Circuit undermined *Strickland*.

Three elements reflect Huffington's counsel's failure to conduct a pretrial investigation: (i) he interviewed no potential defense witness; (ii) he did not initiate a timely search for Rassa, the essential defense witness; and (iii) he failed to challenge the vulnerabilities in the State's evidence. Any one of these critical errors would render counsel's performance objectively unreasonable under *Strickland*.

(i) Failure to Interview Witnesses -- Counsel's failure to interview *any* witnesses was deficient under *Strickland*. *See, e.g., Weidner v. Wainwright*, 708 F.2d 614 (11th Cir. 1983) (counsel ineffective for failing to discover important witnesses until after trial); *House v. Balkom*, 725 F.2d 608 (11th Cir.), *cert. denied*, 469 U.S. 870 (1984); *Chambers v. Armontrout, supra*; *Nealy v. Cabana*, 764 F.2d 1173 (5th Cir. 1985). The Eighth Circuit has held that "once [a defendant] provide[s] his trial counsel with the names of potential alibi witnesses, it [is] unreasonable [for counsel] not to make some effort to interview all these potential witnesses to ascertain whether their testimony would aid an alibi defense." *Lawrence v. Armontrout*, 900 F.2d 127, 129 (8th Cir. 1990). The Eleventh Circuit has refused to excuse an attorney's decision not to interview *one* particular witness, even though counsel presented six defense witnesses. *Holsomback v. White*, 133 F.3d 1382, 1385 n.2, 1388 (11th Cir. 1998) (counsel inadequate for failure to interview doctor whose examination of victim revealed no signs of sexual assault); *see Groseclose v. Bell*, 130 F.3d 1161 (6th Cir. 1997) (counsel's performance ineffective partly because "he never . . . interviewed the crime incident witnesses or any family members"), *cert. denied*, __ U.S. __, 118 S.Ct. 1826 (1998); *Sanders v. Ratelle*, 21 F.3d 1446, 1457 (9th Cir. 1994) (counsel could not decide not to call witness without interviewing him).

Huffington asked his trial counsel to contact twenty-eight potential defense witnesses (E0005; A1034; *see also* A1506-07, A1030), yet the Fourth Circuit approved trial counsel's failure to contact any of these individuals before trial. The Fourth Circuit's observation that the nineteen-year-old Huffington had erroneously described the individuals as "character" witnesses cannot excuse trial counsel's torpor.

(ii) Failure to Secure Rassa -- Because counsel had four months in which to secure Rassa's appearance at trial, there is no excuse for his delay until the second day of jury selection to subpoena Rassa, and until the first day of jury selection to

begin even looking for him. The Fourth Circuit uncritically accepted counsel's "tactical" justification for his torpor: that he did not subpoena Rassa earlier out of fear that Rassa would leave the jurisdiction. 140 F.3d at 579. This *post hoc* justification is revealed as fiction by counsel's conduct: he attempted to subpoena Rassa one day into jury selection, even though he expected that Rassa would not testify for several more weeks. (A1509.) If trial counsel truly feared Rassa would flee, he would have subpoenaed Rassa at the end of the State's case, not at the beginning of jury selection, or (more reasonably) he would have used Maryland's mechanism for physical attachment of a witness. *See Nealy v. Cabana*, 764 F.2d at 1178 (failure to attach witness supported ineffectiveness holding).[9]

(iii) Failure to Challenge the Hair, Fingerprint and Bullet Evidence -- The Fourth Circuit's ruling on this point contradicts holdings in at least three other jurisdictions. The Ninth Circuit has held that failure to investigate *one* portion of the State's evidence -- a toxicology report -- rendered counsel ineffective. *Duran v. Thurman*, No. 96-15213, 1997 U.S. App. LEXIS 1373 (9th Cir. Jan. 23, 1997) (unpublished), *amended*, 1997 U.S. App. LEXIS 9057 (9th Cir. Apr. 24, 1997). *See also Jones v. Wood*, 114 F.3d 1002, 1011-1012 (9th Cir. 1997) (failure to test blood on defendant's clothes and hair at crime scene, if test results supported defendant, would warrant habeas relief); *House v. Balkom*, 725 F.2d 608 (11th Cir. 1984) (ineffective to fail to test state's blood evidence and present alternative theory to jury); *Sims v. Livesay*, 970 F.2d 1575, 1580 (6th Cir. 1992) (examination of quilt for gunshot residue could have undermined prosecution). But the Fourth Circuit excused trial counsel's failure to test and adequately challenge three crucial pieces of the State's

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[9] The Fourth Circuit also imagined that trial counsel delayed subpoenaing Rassa to avoid "giving information to the state." *See* 140 F.3d at 579. Knowing that Rassa's testimony could devastate its case, the State undoubtedly anticipated that Huffington would seek Rassa's appearance at trial.

evidence: the bullet analysis, the hair analysis, and the fingerprint testimony. *See* pp. 9 - 10, *supra*.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 24, 1998

# APPENDIX A

**PUBLISHED**

## UNITED STATES COURT OF APPEALS

**FOR THE FOURTH CIRCUIT**

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No. 96-7930.

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JOHN NORMAN HUFFINGTON,
*Petitioner-Appellant,*

v.

EUGENE NUTH, Warden; ATTORNEY GENERAL OF THE STATE OF MARYLAND,
*Respondents-Appellees.*

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Appeal from the United States District Court
for the District of Maryland, at Baltimore.
William M. Nickerson, District Judge.
(CA-94-3059-WMN)

Argued: January 29, 1998

Decided: March 31, 1998

Before MURNAGHAN, NIEMEYER, and MOTZ, Circuit Judges

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Affirmed by published opinion. Judge Motz wrote the opinion, in which Judge Murnaghan and Judge Niemeyer joined.

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## COUNSEL

**ARGUED:** Jon Steven Baughman, ROPES & GRAY, Washington, D.C., for Appellant. Gwynn X. Kinsey, Jr., Assistant Attorney General, Criminal Appeals Division,

OFFICE OF THE ATTORNEY GENERAL, Baltimore, Maryland, for Appellees. **ON BRIEF:** David Overlock Stewart, ROPES & GRAY, Washington, D.C., for Appellant. J. Joseph Curran, Jr., Attorney General of Maryland, Criminal Appeals Division, OFFICE OF THE ATTORNEY GENERAL, Baltimore, Maryland, for Appellees.

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## OPINION

DIANA GRIBBON MOTZ, Circuit Judge:

A jury found John Norman Huffington guilty of murdering two people on Memorial Day weekend in 1981. After pursuing direct appeals and seeking post-conviction relief from the state courts, Huffington petitioned for federal habeas relief. The district court denied his petition for a writ of habeas corpus, and we affirm.

### I.

### A.

On November 13, 1981, a jury convicted Huffington on two counts of felony murder and related offenses. All of the charges stemmed from the brutal murders of Joseph Hudson and Diane Becker in the early morning hours of May 25, 1981. The Maryland Court of Appeals reversed Huffington's conviction based on an evidentiary error unrelated to this habeas petition, and remanded for a new trial. *See Huffington v. State*, 452 A.2d 1211 (Md. 1982).

At the second trial, a jury again convicted Huffington of two counts of felony murder and related offenses, and sentenced him to death. Huffington appealed once more, asserting a different evidentiary error. The Maryland court of Appeals rejected the argument and affirmed. *See Huffington v. State*, 500 A.2d 272 (Md. 1985), *cert. denied sub nom. Huffington v. Maryland*, 478 U.S. 1023 (1986).

Under Maryland law, Huffington could not raise a claim of ineffective assistance of counsel on his direct appeal. *See Johnson v. State*, 439 A.2d 542, 559 (Md. 1982). He therefore filed a petition for postconviction relief with the Circuit Court for Frederick County. That court vacated his death sentence, but otherwise denied postconviction relief. Huffington thereafter filed an application to appeal the partial denial of post-conviction relief. The Maryland Court of Appeals refused to grant his application for leave to appeal and his motion to reconsider that action. The Supreme Court denied his petition for certiorari. *See Huffington v. Maryland*, 502 U.S. 985 (1991).

When the State elected not to seek the death penalty, the state trial court resentenced Huffington to consecutive life terms. He then filed a second application for state post-conviction relief, asserting a single argument: the denial of application for leave to appeal in his first state post-conviction proceeding violated his equal protection and due process rights. The state trial court denied his petition, and the Maryland Court of Special Appeals, after initially remanding for explication of the trial court's rationale, denied his application for leave to appeal.

In November 1994, Huffington filed an application for a writ of habeas corpus with the district court. A magistrate judge issued a report recommending denial of the writ. The district court, after conducting a *de novo* review and correcting certain legal errors, adopted the recommendation and denied the writ. Huffington then appealed to this court.

B.

At Huffington's trial, the State presented both direct and circumstantial evidence that Huffington killed Hudson and Becker. Deno Kanaras, who had already been convicted in connection with the murders, testified for the State at both of Huffington's trials. The Maryland Court of Appeals recounted his testimony as follows.

[Huffington] spoke with Hudson at the Golden Forty [a nightclub where Hudson worked as a disc jockey] and arranged to make a cocaine purchase after the bar closed. On leaving the club, they [Kanaras and Huffington] followed Hudson and company to the camp ground [in Kanaras's car], stopping at the 7-11 on the way. At the trailer, [Huffington] spoke with Hudson about purchasing 3 1/2 grams of cocaine, and about arranging a subsequent deal for the remainder of Hudson's cocaine. [Huffington] purchased the 3 1/2 grams for $275, toward which Kanaras contributed $100. [Huffington] agreed to try to arrange a deal for the remainder of Hudson's cocaine, approximately another 3 1/2 grams, at a price of $350. Kanaras and [Huffington] then left the trailer and went to [Huffington's] apartment, arriving at about 3:30 am. At the apartment, Kanaras sat in the living room while [Huffington] went to the bedroom to make some telephone calls. [Huffington] subsequently returned and indicated that he had arranged a purchase. They returned to the campground where [Huffington] told Hudson he had a purchaser and also wanted to discuss a bigger deal later that evening. Hudson then got dressed and left a note on a counter in the trailer whereupon the three men left in Kanaras's car. [Huffington] gave directions to Wheel Road and instructed Kanaras to park the car in the driveway of an old farm. All three men got out of the car and walked up the driveway, Kanaras and Hudson walking side by side, [Huffington] following. Suddenly, Kanaras heard four or five gunshots and Hudson fell. [Huffington] reloaded the revolver, approached Hudson, and fired twice from close range into the left side of the head. Kanaras was so shocked he didn't know what to say. [Huffington] then rolled Hudson's body over and pulled a bag of cocaine out of his shirt pocket.

Ultimately, [Huffington] placed this bag of cocaine into a Marlboro cigarette box. [Huffington] removed the bag from Hudson's pocket, turned to Kanaras, pointed the gun at him, and ordered him to drive them back to the campground. [Huffington] said that Hudson had $2000 at the campground, which he wanted. At the entrance to the campground, [Huffington] directed Kanaras to park the car some distance from Hudson's trailer so it would not be seen and to leave the car unlocked with the keys in the ignition. [Huffington] also directed Kanaras to accompany him to the trailer. [Huffington] opened the door, which was unlocked, and they went in. Becker's son was asleep in the back of the trailer at the time. After [Huffington] picked up the note Hudson had left and put it in his pocket, they searched the trailer, and Kanaras found the money in a cabinet. [Huffington] then drew a knife out of his boot and told Kanaras to kill Diane Becker. Kanaras, shocked, said he could not kill her. [Huffington] then walked over toward the bed, picked up a bottle from the floor, and struck Becker five or six times in the back of the head. [Huffington] then took the knife and stabbed Becker repeatedly in the chest, back and throat. When [Huffington] finished stabbing Becker in the throat, Kanaras regained his senses and left the trailer. [Huffington] was fifteen or twenty feet behind. They ran to the car, [Huffington] carrying the bottle and a pocketbook. They then drove to [Huffington's] apartment.

At the apartment, [Huffington] changed clothes, and cleaned the gun, knife, and bottle with some rags. He counted the money and forced Kanaras to take $840, although Kanaras tried to refuse it. [Huffington] put his pants in the sink and poured bleach on them in an effort to clean out the bloodstains. Later, he put the pants into a bag and

> put the knife, bottle, and pocketbook into another bag. They then left the apartment, [Huffington] having ordered Kanaras to take him to the Fiddler's Convention. En route, they stopped by a creek at Harmony Church Road where [Huffington] threw the bottle into some brush, burned the pocketbook and note, and threw some live rounds of ammunition into the creek. They drove further to a location in Cecil County where [Huffington] dropped the knife and gun into some stagnant water. Still terrified, being unsure whether [Huffington] possessed any further weapons, Kanaras drove [Huffington] to the Fiddler's Convention as directed. They walked around the Convention and Kanaras spoke with someone he knew. They left after an hour. Kanaras drove [Huffington] to Hall's Furniture Store in Aberdeen, where a friend of [Huffington's] would be working. At that time, [Huffington] threw the bag with the pants into a nearby dumpster. [Huffington] then went into the furniture store. Kanaras drove home.

*Huffington*, 452 A.2d at 1212-13 (quoting the agreed upon statement of facts); *see Huffington*, 500 A.2d at 274. In addition to this account, Kanaras testified that he once owned the gun used in the murders, but that he had sold the gun to Huffington approximately five weeks prior to the murders—i.e., sometime in April.

The State did not rely entirely on Kanaras' testimony. Rather, it also presented a significant amount of circumstantial evidence substantiating Kanaras' account and linking Huffington to the murders. On May 26, the day after the murders, Kanaras directed the police to locations in the area surrounding Bel Air, Maryland. At one location the police fished out of a pool of water a gun, holster, knife, sheath, and several live rounds of .38 caliber ammunition. At a second location they recovered more live rounds of .38 caliber ammunition, the remains of a burnt pocketbook

(including identification cards belonging to Becker), and a vodka bottle. At a third location, in a dumpster, they unearthed a brown paper bag containing a pair of corduroy pants that smelled of bleach. On May 27, the police searched Huffington's apartment, where they recovered a bottle of bleach from his night table and a pack of Marlboro cigarettes containing a small bag with a substance subsequently identified as cocaine.

At trial, the State presented testimony regarding the evidence just detailed, as well as evidence collected from Becker's trailer and from the location around Hudson's body. According to a Federal Bureau of Investigation (FBI) ballistics expert, spent shell casings found near Hudson's body were fired from the gun found in the water, and the bullets that killed Hudson could have been fired from that gun. Further, an FBI chemical composition analysis expert determined that samples of the ammunition collected from the remote locations showed "analytically indistinguishable" characteristics when compared with samples of the bullets retrieved from Hudson's body. The expert also testified that his experience indicated all of the bullets (except one, which represented a different version of a .38 caliber bullet) could have come from the same box of ammunition.

An FBI hair expert testified that hair samples taken from Becker's garter belt and blanket microscopically matched a known sample of Huffington's hair. An FBI fingerprint expert identified a fingerprint found on the vodka bottle as that of Huffington's right index finger. A serology expert testified that blood on the vodka bottle could have come from Becker, and that blood found on Huffington's boot could have been human blood. Chemical analysis verified that the substance found in the Marlboro cigarette box in Huffington's apartment was cocaine. *See Huffing*ton, 452 A.2d at 1213-14. Local police testified that Huffington fit into the recovered corduroy pants.

The police further explained that on May 26, Huffington made a voluntary statement indicating that he and Kanaras

had remained at the Golden Forty until closing and then went directly to the Fiddler's Convention. When challenged, Huffington changed his statement to the police. He admitted going to the trailer with Kanaras to purchase drugs after the Golden Forty closed, but stated he then went with Kanaras to the Fiddler's Convention. Huffington denied, and continues to deny, that he participated in, or was even present during, the murders.

The State also submitted testimony from Huffington's then-girlfriend and a number of his acquaintances. The girlfriend, Kim Bognani, stated that Huffington came to her apartment on the evening of May 25 and, although he had never spoken of going to Florida prior to that night, asked her to go with him on a trip to Florida. They then spent part of the evening investigating airline ticket fares. Bognani further testified that Huffington had some cocaine in a Marlboro box that evening, that he was known to possess a gun he allegedly obtained from Kanaras, and that she knew he owned a pair of corduroy pants like those found in the dumpster.

Testimony from acquaintances of Huffington indicated that they observed Huffington in possession of both the knife and the gun prior to the murders. One witness, James Brinegar, testified that he saw Huffington with the gun earlier that weekend. Another witness, Laura Nengel, stated that she saw the knife in Huffington's kitchen drawer in April.

## II.

Huffington principally contends that his trial attorney rendered ineffective assistance of counsel. The familiar performance and prejudice test enunciated by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984), governs this claim. First, Huffington must demonstrate that the performance of his trial counsel failed to meet an objective standard of reasonableness. Second, Hufffington must also show that this failure resulted in prejudice.

The *Strickland* test seeks to root out deficient performance that renders a trial unfair to a criminal defendant. "Only those habeas petitioners who can prove under *Strickland* that they have been denied a fair trial by the gross incompetence of their attorneys will be granted the writ . . . ." *Kimmelman v. Morrison*, 477 US. 365, 382 (1986). The inquiry as to whether counsel rendered objectively reasonable assistance is necessarily deferential and depends upon the circumstances of the individual case. *Strickland*, 466 U.S. at 689. In fact, "to eliminate the distorting effects of hindsight," *id.* at 689, courts must evaluate the challenged performance "as of the time of counsel's conduct." *Id.* at 690. "[T]hat is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* (internal quotation marks omitted).

But even objectively unreasonable performance does not require a court to disturb a verdict unless the unreasonable performance has adversely affected the defense. Under the prejudice prong of *Strickland*, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. Given that the ultimate concern is the fundamental fairness and reliability of the outcome of the trial, when making the prejudice determination a court "must consider the totality of the evidence before the judge or jury." *Id.* at 695. Moreover, when evaluating prejudice a court may consider all aspects of the evidence proffered by the petitioner, including aspects both beneficial and detrimental to petitioner's case. *See, e.g., Whitley v. Blair*, 802 F.2d 1487, 1493-96 (4th Cir. 1986) (any mitigating evidence that trial counsel might have developed would have been accompanied by aggravating evidence, and thus the alleged failure to develop the evidence did not result in prejudice).

Determinations regarding the effectiveness of counsel involve mixed questions of law and fact that we review *de novo*. *See Smith v. Angelone*, 111 F.3d 1126, 1131 (4th Cir.),

*cert. denied*,__ U.S.__, 118 S. Ct. 2 (1997). A state court's determinations of historical facts, however, made after a hearing on the merits, are presumed correct, and the habeas petitioner bears the burden of establishing by convincing evidence that they are erroneous. *See Sumner v. Mata*, 455 U.S. 591, 597 (1982) (interpreting 28 U.S.C.A. § 2254(d) prior to its amendment by the Antiterriorism and Effective Death Penalty Act of 1996, Pub.L. No. 104-132,110 Stat. 1214 (1996)); *Savino v. Murray*, 82 F.3d 593, 598 (4th Cir.) (same), *cert. denied*, 117 S. Ct. 1 (1996); *see also Lindh v. Murphy*,___ U.S. ___, 117 S. Ct. 2059, 2063-68 (1997) (holding Antiterrorism and Effective Death Penalty Act — including the new "deference" standard applicable to state court determinations — does not govern habeas applications in non-capital cases pending when the Act was passed).

With this framework in mind, we turn to Huffington's claims.

A.

The first instance of alleged ineffective assistance involves a potential witness named Stephen Rassa. As noted by the Court of Appeals of Maryland, Rassa testified as a rebuttal witness for the State during its successful prosecution of Kanaras. *See Huffington*, 500 A.2d at 274. Rassa also testified at Huffington's state post-conviction hearing.

Rasssa's testimony included accounts of past drug deals between Kanaras and Hudson, information that Kanaras owed Hudson money, and Rassa's recollection that approximately four days prior to the murders Kanaras discussed robbing Hudson. Rassa also recounted that Kanaras mentioned having a knife and a gun at the time, and that he thought Kanaras intended to kill Hudson. Huffington contends that this testimony would have severely impeached the credibility of Kanaras, especially given that Kanaras denied some of these allegations on cross-examination. *See id.* 292-93 (McAuliffe, J., dissenting) (characterizing Rassa's testimony as crucial to impeaching Kanaras' testimony).

Huffington argues that Rassa's testimony would have proved critical to his defense strategy and that his counsel's failure to locate or subpoena Rassa until the first day of trial, or to make substantial efforts to find Rassa, amounts to ineffective assistance. In response, the State asserts that the state post-conviction court found that defense counsel's "efforts in regard to Rassa" constituted a tactical decision, to which we should defer. *See* Brief of Respondent at 18. Although the state post-conviction court made no such finding, the evidence supports that conclusion, and so Huffington's argument fails.

Trial counsel testified at Huffington's post-conviction relief hearing that he decided not to subpoena Rassa until the start of trial for tactical reasons. He explained that he had the benefit of the transcript of Rassa's testimony at the Kanaras trial and the defense's investigative notes from Huffington's first trial. He worried about Rassa's stability and willingness to testify, and so did not attempt to contact Rassa until the second trial began. A letter from Huffington to trial counsel in 1983 indicates that Huffington concurred in this strategy; in the letter, Huffington conveyed his desire to keep the identity of defense witnesses from the State "until it's too late for the State to scare them away." Further, at the post-conviction hearing counsel stated that he and Huffington "discussed the potential problems in timing of subpoenaing" witnesses.

Additionally, the record shows that, although the effort failed, Huffington's trial counsel ultimately did hire an experienced former local police lieutenant to find Rassa. The lieutenant was probably unsuccessful because, as Rassa testified at the post-conviction hearing, at the time of Huffington's trial he had moved to California and his family had no idea where to locate him. Rassa explained that he had decided to avoid further embarrassment to his family in connection with the murders, and that he appeared at the post-conviction hearing only under threat of being forced to return in handcuffs.

The evidence above supports the conclusion that trial counsel made a tactical decision regarding *when* to subpoena

Rassa; that his decision was consistent with Huffington's expressed concern about giving information to the State; that counsel ultimately took reasonable steps to locate Rassa, who was intent on avoiding participation; and that, viewed from counsel's vantage point at the time of trial, his tactical decision fell within the "wide range of professionally competent assistance" contemplated by *Strickland*. *See Strickland*, 466 U.S. at 690; *cf. Blair-Bey v. Nix*, 44 F.3d 711, 713 (8th Cir.1995) (holding counsel did not render ineffective assistance where "[c]ounsel's failure to locate the two witnesses was understandable because the witnesses did not want to be found"). Because trial counsel's performance with regard to Rassa did not fall below an objective standard of reasonableness, we need not address the prejudice prong of the *Strickland* test. *See Strickland*, 466 U.S. at 697.

B.

Huffington next argues that trial counsel rendered ineffective assistance by failing to investigate, interview, and present defense witnesses helpful to his case. In particular, Huffington points to the assertedly essential testimony of five witnesses—Earl Thomas Wagner, Gary Aschenbach, Norris Huffington, Thomas Hall, and William Palmisano—who testified at his post-conviction hearing, some of whom he specifically asked his trial counsel to contact prior to trial.

*Strickland's* objective reasonableness prong requires counsel to conduct appropriate factual and legal inquiries and to allow adequate time for trial preparation and development of defense strategies. *See Sneed v. Smith*, 670 F.2d 1348, 1353 (4th Cir.1982); *Coles v. Peyton*, 389 F.2d 224, 226 (4th Cir.1968). Counsel must ordinarily "investigate possible methods for impeaching prosecution witnesses," and in some instances failure to do so may suffice to prove a claim under *Strickland*. *See Hoots v. Allsbrook*, 785 F.2d 1214, 1221 (4th Cir.1986).

The Sixth Amendment, however, does not always compel counsel to undertake interviews and meetings with potential witnesses where counsel is familiar with the substance of their testimony. *See LaGrand v. Stewart*, 133 F.3d 1253,1274 (9th Cir.1998) (trial counsel need not interview witnesses where counsel is familiar with witnesses' account); *Turner v. Williams*, 35 F.3d 872, 896 (1994) (same), *cert. denied*, 514 U.S. 1017 (1995), *overruled on other grounds by O'Dell v. Netherland*, 95 F.3d 1214 (4th Cir.1996), *aff'd*, ___U.S.___, 117 S.Ct. 1969 (1997); *Eggleston v. United States*, 798 F.2d 374, 376 (9th Cir.1986) (same). In this case, Wagner, Aschenbach, Hall, and Norris Huffington all testified at the Kanaras trial. *See* Brief of Appellant at 15-16. Trial counsel had the transcripts from the Kanaras trial, as well as those from Huffington's first trial, so he generally knew the substance of their testimony.

Nevertheless, Huffington insists that his counsel's failure to contact these witnesses must constitute deficient representation. This and other courts have held an attorney's representation deficient when he failed to contact and interview important prospective witnesses, especially when they were readily available or had been identified by the defendant prior to trial. However, Huffington's reliance on these cases is somewhat misplaced. Most of them involve alibi witnesses or eyewitnesses critical to the determination of guilt, and none of Huffington's proffered witnesses fall into those categories. *See, e.g., Sanders v. Ratelle*, 21 F.3d 1446, 1456-58 (9th Cir. 1994) (exculpatory witness); *Griffin v. Warden*, 970 F.2d 1355, 1358 (4th Cir. 1992) (alibi witness); *Grooms v. Solem*, 923 F.2d 88, 90 (8th Cir. 1991) (alibi witness); *Chambers v. Armontrout*, 907 F.2d 825, 829-32 (8th Cir. 1990) (self-defense witness); *Lawrence v. Armontrout*, 900 F.2d 127,129-30 (8th Cir. 1990) (alibi witnesses); *Blackburn v. Foltz*, 828 F.2d 1177, 1182-83 (6th Cir. 1987) (alibi witness); *Hoots*, 785 F.2d at 1219-20 (eyewitness); *Nealy v. Cabana*, 764 F.2d 1173, 1177-78 (5th Cir. 1985) (alibi witness); *Weidner v. Wainwright*, 708 F.2d 614, 616 (11th Cir. 1983) (self-defense witnesses). Although "a lawyer's failure to investigate a witness who has been identified as crucial may indicate an inadequate investigation,

the failure to investigate everyone whose name happens to be mentioned by the defendant does not suggest ineffective assistance." *Gray v. Lucas*, 677 F.2d 1086, 1093 n. 5 (5th Cir. 1982); *see Nealy*, 764 F.2d at 1178.

This standard would seem to apply particularly when the defendant himself denominates witnesses as just "character" witnesses, which is precisely what Huffington did. In a pre-trial letter to his counsel, Huffington (a seemingly savvy client) specifically characterized the witnesses he wanted contacted (including Wagner and Hall) as "character," not "alibi" or impeachment, witnesses. The Supreme Court has recognized that "[t]he reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." *Strickland*, 466 U.S. at 691. Thus, we cannot find error in the state post-conviction court's determination that Huffington's counsel made a reasonable tactical decision not to call character witnesses at the guilt stage of the trial.

In making the reasonableness determination, "we must appreciate the practical limitations and tactical decisions that trial counsel faced. . . . Particularly when evaluating decisions not to investigate further, we must regard counsel's choices with an eye for 'reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.'" *Bunch v. Thompson*, 949 F.2d 1354, 1363 (4th Cir.1991) (quoting *Strickland*, 466 U.S. at 691). Considering all of the circumstances of this case, defense counsel's failure to contact the witnesses Huffington identified did not constitute objectively unreasonable representation.

Even if counsel's failure to contact these five witnesses fell below a standard of objective reasonableness, Huffington's ineffective assistance claim still cannot succeed because the failure to contact these witnesses did not prejudice him. According to Huffington, Wagner, Maryland State Trooper Aschenbach, and Hall would have contradicted Kanaras, the principal government witness, and his father, Norris Huffington, would have further impeached Kanaras'

credibility. Huffington maintains that Wagner would have testified that Kanaras was "hot" for cocaine and obsessed with money; that Kanaras had the gun well after he claimed to have sold the gun to Huffington; and that Kanaras owned a hunting knife like the one used in the murders. Huffington contends that Aschenbach would have similarly testified as to Kanaras' involvement with drugs and need for money, that he possessed a gun, and that he displayed violent tendencies. Huffington claims that Hall would have stated that Huffington had too little time to throw the bag containing the corduroy pants into the dumpster near Hall's family business, as Kanaras testified. Huffington's father would have testified that Kanaras had an easy manner when they spoke on the morning of May 25, and that Kanaras waited for Huffington for forty-five minutes without leaving. This demeanor, Huffington insists, belies Kanaras' testimony that Huffington forced him along on these murders.

In fact, none of this testimony proves as compelling as Huffington suggests. Wagner's and Ashenbach's testimony as to Kanaras' obsession with drugs and his violent past essentially would have been cumulative. At trial, Kanaras acknowledged his drug abuse, his prior dealings with Hudson, and his convictions and life sentences for these murders. *See Hunt v. Nuth*, 57 F.3d 1327, 1333 (4th Cir.1995) (counsel's failure to obtain cumulative evidence does not demonstrate prejudice). Furthermore, their proffered testimony as to Kanaras' possession of a gun would not have conflicted with Kanaras' own account. Wagner asserted that Kanaras possessed a gun in late April or early May; Aschenbach testified that Kanaras had a gun in late March. Neither of these statements contradicts Kanaras' testimony that he owned the gun until he sold it to Huffington sometime in April.

Hall, Huffington's good friend—Huffington described Hall as his "main man"—merely speculated as to the timing issue:

> I was on the phone at the time [that Kanaras and Huffington drove up to the store] and I just glanced out and I saw the car and I continued with the conversation and I was on the phone, and about fifteen (15) or twenty (20) seconds later, you know, I heard the bell ring, and turned around and [Huffington] was in the store.

Hall's statement strongly suggests that he did not pay much attention either to Huffington's actions or to the time frame involved.

We must evaluate the testimony of Huffington's own father in light of the potential bias inherent in such testimony. *See Romero v. Tansy*, 46 F.3d 1024, 1030 (10th Cir. 1995) (testimony of defendant's family members is of less value than that of objective witnesses); *Gullett v. Armontrout*, 894 F.2d 308, 310 (8th Cir. 1990) (testimony of wife "would in all probability not have changed the verdict of the jury given [her] . . . obvious bias"). Even if fully credited, this testimony indicates only that Kanaras may have been a more willing participant than he admitted. It does little, if anything, to undermine Kanaras' testimony as to Huffington's participation in the murders.

Nor do we find persuasive Huffington's argument that the testimony of William Palmisano could have rebutted the testimony of another government witness. Palmisano, a graduate biochemistry student who once lived with Huffington, assertedly would have refuted the trial testimony of Laura Nengel, the witness who testified that she saw the knife in Huffington's kitchen drawer in April 1981. Palmisano's testimony does conflict with aspects of Nengel's testimony. Nengel recounted that she saw the knife in Huffington's kitchen drawer in April 1981, and that the knife was purchased by Palmisano during an outing to Baltimore's Inner Harbor. Palmisano admitted that he went to the Inner Harbor with Nengel, but stated that a different friend

purchased a knife that day. He also testified that the knife purchased was broken just a few days later.

This testimony conflicts with Nengel's account of how Huffington came into possession of the knife, even if it does not directly contradict her recollection of the knife's presence in Huffington's apartment. Nengel, however, was not an essential witness. The State's other evidence against Huffington was overwhelming. *See United States v. Prows*, 118 F.3d 686, 693 (10th Cir. 1997) (holding trial counsel's failure to interview or call witness that could have directed testimony of government witness not prejudicial where other "overwhelming evidence" existed). In light of the other evidence linking Huffington to the crimes, counsel's failure to obtain Palmisano's testimony does not raise a reasonable probability that undermines our confidence in the jury verdict. *See Strickland*, 466 U.S. at 694.

C.

Huffington also maintains that trial counsel failed to launch an adequate challenge to the State's physical evidence, and expert testimony interpreting that evidence. His argument centers on evidence and testimony regarding bullet composition, hair comparison, and fingerprint identification.

Huffington contends that counsels failure to cross-examine the State's bullet composition expert, Donald Havekost, or to have his results confirmed by another expert, amounted to ineffective assistance. Havekost testified at trial that composition samples taken from the live ammunition and from bullets recovered from Hudson's body were "analytically indistinguishable," and that all but one of the bullets could have come from the same box of ammunition. In support of his argument, Huffington directs us to the post-conviction testimony given by Dr. Vincent Guinn, a metal composition expert, who described a number of asserted errors in Havekost's method of analysis.

The fundamental weakness in this argument lies in trial counsel's testimony that he chose not to attack this forensic evidence for strategic reasons. As the state post-conviction court found, his trial strategy involved asserting that Huffington was not even present during the commission of the crimes. In counsel's view, an attack on the reliability of the bullet composition testimony did not fit that strategy. This tactical decision, viewed from the vantage point of trial and not from hindsight, does not fall outside the wide range of reasonable discretion afforded to counsel. *See Stickland*, 466 U.S. at 697. Furthermore, Dr. Guinn never contested the actual results obtained by Havekost. Dr. Guinn criticized the methodology used to reach those results, and the propriety of drawing the conclusions Havekost drew. (Havekost also testified at the post-conviction hearing, disputing Dr. Guinn's criticisms and criticizing Dr. Guinn's method.) In view of Huffington's defense theory, we cannot conclude that failure to offer expert testimony similar to Dr. Guinn's prejudiced Huffington.

Huffington next challenges counsel's cross examination of the FBI hair expert, Michael Malone. Huffington complains of counsel's failure to obtain from Malone an admission that he never tried to microscopically match the hair collected from the crime scene with Dianne Becker's hair. Again, this failure does not amount to ineffective assistance. Agent Malone's testimony was clear. Two hairs taken from Becker's garter belt and blanket microscopically matched samples of Huffington's hair. They did not microscopically match the known samples of Kanaras' or Hudson's hair, nor did they visually match Becker's hair, which was longer and of a different color. It is evident from this testimony, which Malone offered at trial, that he did not match the hair collected at the crime scene microscopically (rather than visually) with a sample of Becker's hair.

Moreover, on cross examination, Malone testified that microscopic hair analysis alone does not provide a sufficient basis to identify a person with positive assurance. Malone

further acknowledged that the hair at the crime scene could have come from others with the same microscopic characteristics, although he noted it would be highly unlikely to find two persons with the same microscopic characteristics in such close proximity. Counsel also established that Malone did not test the hair of a man named David Britton, who had been at the trailer with Becker on the evening of the murders. In light of all of this testimony, counsel's failure to obtain the admission Huffington now asserts is so important did not result in prejudice to Huffington.

Additionally, Huffington cites trial counsel's failure to elicit the FBI fingerprint expert's inability to establish the exact time that Huffington left his fingerprint on the vodka bottle. Counsel did not cross examine this witness to obtain the testimony Huffington now desires; however, counsel did make this point in his closing argument. After conceding that Huffington visited the trailer that night, counsel emphasized that the State could only speculate as to the timing of the fingerprint. Counsels closing argument, combined with the degree of common sense imputed to juries every day, *see e.g. United States v. Mulderig*, 120 F.3d 534, 547 (1st Cir.1997) (acknowledging that a jury "may properly rely on their 'common sense'"), satisfies us that a failure to obtain evidence as to fingerprint timing did not constitute ineffective assistance of counsel.

D.

Huffington alludes to two other asserted deficiencies by trial counsel. Huffington questions the assignment of the Kanaras cross examination to local co-counsel, Robert Rothenhoefer. Rothenhoefer had over twenty years of experience as a local county prosecutor. According to the post-conviction transcript, Rothenhoefer drew up twelve to fifteen pages of questions to impeach Kanaras' credibility. He questioned Kanaras for over an hour. This conduct does not fall below a measure of objective reasonableness.

Huffington also challenges trial counsel's waiver of his opening statement. Although it maybe unusual to waive an opening statement, such a decision is essentially tactical in nature, and not objectively unreasonable. *See Nguyen v. Reynolds*, 131 F.3d 1340, 1350 (10th Cir. 1997); *United States v. Rodriguez-Ramirez*, 777 F.2d 454, 458 (9th Cir. 1985); *cf. Hunt*, 57 F.3d at 1332 (waiver of opening statement until after prosecution's case is essentially tactical decision within the wide range of reasonable attorney conduct).

E.

Finally, Huffington maintains that, even if individually the above instances do not amount to ineffective assistance of counsel, collectively they do. *See Williams v. Armontrout*, 912 F.2d 924, 934 (8th Cir. 1990) (evaluating cumulative effect of asserted errors); *Blackburn*, 828 F.2d at 1184 (analyzing overall attorney performance). However, the trial in this case contained few, if any, errors.

Viewing the evidence as a whole, including any errors, our confidence in the outcome of the trial remains undisturbed.

III.

Huffington's remaining two arguments require less explication.

A.

The first involves the state court's refusal to admit the transcript of Stephen Rassa's prior testimony. When it became apparent that Rassa was unavailable to testify at Huffington's trial, Huffington moved to admit a transcript of Rassa's testimony at Kanaras' trial. The trial judge excluded the transcript. The Maryland Court of Appeals affirmed the exclusion, finding that the State originally offered the testimony at the Kanaras trial to rebut Kanaras' testimony regarding his participation in drug deals. *See Huffington*, 500 A.2d at 274. For this reason, the Court of Appeals held that the State did not possess a sufficiently similar motive to

develop the testimony of Rassa at Kanaras' trial as it would at Huffington's trial, and thus the trial court had properly excluded the transcript. *See Huffington*, 500 A.2d at 277-79.

Huffington initially contends that Maryland law required admission of the transcript. That argument must fail. The Maryland Court of Appeals has already directly ruled to the contrary. A federal court on habeas review of a state conviction will not "reexamine state-court determinations on state-law questions." *Estelle v. McGuire*, 502 U.S. 62, 68 (1991).

Alternatively, Huffington asserts that federal constitutional principles require admission of the transcript. Huffington relies on *Chambers v. Mississippi*, 410 U.S. 284 (1973), and *Green v. Georgia*, 442 U.S. 95 (1979). In those cases, the Supreme Court held that, to prevent a defendant from being deprived of a fair trial, the Due Process Clause required admission of exculpatory confessions by third parties—even if otherwise excludable on the basis of state evidentiary rules—where the evidence is "highly relevant to a critical issue" in the case, *Green*, 442 U.S. at 97, and sufficient indicia of reliability exist. *See id; Chambers*, 410 U.S. at 302.

Huffington insists that Rassa's testimony bore sufficient indicia of reliability, including: Rassa testified under oath at Kanaras' trial; the State credited his testimony, offering Rassa as a witness at that time; Kanaras' attorney subjected Rassa to extensive cross examination; and Rassa made a consistent corroborative statement to a friend, Paul Vela. Huffington also claims that Rassa presented evidence "crucial" to his case:

> The transcript of Rassa's testimony would have revealed to the jury that on May 20, 1981, Rassa and Kanaras approached the Hudson-Becker trailer together; Kanaras reached for a gun and a knife; Rassa was convinced that Kanaras intended to rob and kill Hudson; and Rassa had to dissuade Kanaras

> from carrying the weapons into the trailer. Rassa's prior testimony would also have informed the jury of Kanaras' prior drug debts to Hudson.

Brief of Petitioner at 39.

We find Rassa's testimony neither as reliable nor as compelling as Huffington suggests. As to reliability, we note that Rassa testified that *he*, not Kanaras, first brought up the subject of robbing Hudson, and that he lied to the police about this detail. Moreover, at the time Rassa allegedly formed his opinion that Kanaras intended to rob and kill Hudson, Rassa was under the influence of methamphetamines, marijuana and alcohol. In fact, Rassa testified that he abused LSD, PCP, and cocaine, both around the time of the incident with Kanaras and even within a few weeks of his testimony at the Kanaras trial.

Similarly, the statement Rassa made to Paul Vela bears little corroborative value. Rassa did not mention to Vela the alleged willingness of Kanaras to kill Hudson or that Kanaras possessed a gun or knife at the time, both central elements of Rassa's later testimony. Moreover, Rassa made the alleged statement to Vela after Rassa and Vela learned of the murders from the media. Finally, Rassa has admitted that he told his story to the police in part because he feared Kanaras would implicate him. Unlike the statements at issue in *Chambers* and *Green*, Rassa's statement to the police was not against his penal interest, but decidedly in favor of it. *Cf. Cunningham v. Peters*, 941 F.2d 535, 540-41 (7th Cir. 1991) (defendant not denied a fair trial under *Chambers* analysis where hearsay confession excluded because circumstances surrounding confession indicated a possible ulterior motive, and timing and sequence of events undermined its reliability). These facts instill confidence in the reliability of Rassa's prior testimony.

Furthermore, unlike the testimony at issue in *Chambers* and *Green*, Rassa's testimony does not "directly affect[ ] the ascertainment of guilt." *Chambers*, 410 US. at 302. Rather, it

is "far more attenuated" in its connection to Huffington's guilt or innocence. *United States v. Fowlie*, 24 F.3d 1059,1069 (9th Cir. 1994). Rassa's testimony does not tend to exculpate Huffington as the testimony in *Chambers* and *Green* did. Instead, to the extent it would have any effect, it would work to impeach the credibility of Kanaras' testimony regarding his role in the crimes. *See Turpin v. Kassulke*, 26 F.3d 1392, 1395-97 (6th Cir. 1994) (court should consider the extent to which evidence exculpates the accused when undertaking a *Chambers* analysis); *cf. Buchanan v. Angelone*, 103 F.3d 344, 349 (4th Cir.1996) (the "narrow exception recognized by *Green*" did not apply where the evidence excluded did not "strongly tend[ ] to show that the defendant was innocent" as in *Green*), *aff'd*, No. 96-8400, 1998 WL 17109 (U.S. Jan. 21, 1998).

Both in his brief and at oral argument, Huffington contends that no difference exists between exculpatory and impeachment evidence as it pertains to the due process analysis under *Chambers* and *Green*. We note, however, that Huffington does not cite a single case in which any court has applied the *Chambers* and *Green* analysis to hold that the exclusion of impeachment evidence violated the Due Process Clause. When questioned at oral argument, Huffington pointed to *Giglio v. United States*, 405 U.S. 150 (1972), and *Love v. Johnson*, 57 F.3d 1305 (4th Cir. 1995). These cases, however, do not deal with a *Chambers* situation. Rather, they concern denial of due process where the government suppressed or concealed the impeachment evidence. We do not hold here that only direct, exculpatory—as opposed to impeachment—evidence satisfies the *Chambers* and *Green* requirements. But we do hold that, under the facts of this case, the impeachment evidence at issue lacks both the vitality and the reliability required by these cases even if impeachment evidence would suffice.

B.

Finally, Huffington challenges Maryland's system of discretionary appeals for claims of ineffective assistance of counsel. He asserts that this system violated his equal protection rights because it denied him any state appellate review of his claim, either directly or by postconviction application. Huffington argues that "there is no principled ground for denying appellate review to ineffective assistance claims while granting it for Fourth and Fifth Amendment claims." Brief of Petitioner at 47.

Our recent opinion in *Hunt*, 57 F.3d at 1327, squarely forecloses this argument. We stated there that Maryland "has a legitimate interest in conserving judicial resources and need not provide the same review for each type of claim, particularly when Maryland already provides defendants with more than the constitutional minimum of opportunities for review." *Id.* at 1336-37. Nothing Huffington suggests convinces us otherwise. A system of discretionary review, of necessity, contemplates that the courts will at times exercise their discretion not to review a defendant's claim.

IV.

For the foregoing reasons, the district court's denial of habeas relief is

*AFFIRMED.*

## APPENDIX B

## UNITED STATES COURT OF APPEALS
## FOR THE FOURTH CIRCUIT

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No. 96-7930
(CA-94-3059-WMN)

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Filed: May 7, 1998

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John Norman Huffington,
Petitioner - Appellant,

versus

Eugene Nuth, Warden, et al,
Respondents - Appellees.

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ORDER

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The Court amends its opinion filed March 31, 1998, as follows:

On page 7, first full paragraph, lines 4-5 – the sentences beginning "He specifically" and ending "at 1214" are deleted.

On page 7, second full paragraph, line 6 – the last sentence in the paragraph is edited to read:

> Bognani further testified that Huffington had some cocaine in a Marlboro box that evening, that he was known to possess a gun he allegedly obtained from Kanaras, and that she knew he owned a pair of corduroy pants like those found in the dumpster.

On page 17, first full paragraph, lines 5-6 – the words "spent eighty-nine hours preparing his cross examination, and" are deleted.

For the Court – By Direction

/s/ Patricia S. Connor

Clerk

## APPENDIX C

## UNITED STATES COURT OF APPEALS
## FOR THE FOURTH CIRCUIT

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No. 96-7930
CA-94-3059-WMN

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FILED: May 6, 1998

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Huffington v. Nuth

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MANDATE

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The judgment of this Court dated 3/31/98 takes effect today.

PATRICIA S. CONNOR
CLERK

**APPENDIX D**

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF MARYLAND**

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**Case No. WMN-94-3059**

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**Filed: February 27, 1996**

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**JOHN NORMAN HUFFINGTON**

**Petitioner**

**v.**

**EUGENE M. NUTH, et al.,**

**Respondents**

REPORT AND RECOMMENDATION

## I. BACKGROUND

Petitioner, John Norman Huffington, is incarcerated in the Maryland State Penitentiary in Baltimore, Maryland. He has filed a petition for a writ of habeas corpus. Huffington seeks to challenge his conviction in the Circuit Court for Frederick County, on November 19, 1983, for two counts of first degree murder, use of a handgun in the commission of a felony, and unlawfully carrying a concealed weapon. Huffington has exhausted all state remedies for all issues filed in this petition. Further, in light of the extensive record before the Court including the trial transcripts, post conviction transcripts and exhaustive briefs submitted by each party, no hearing is deemed necessary.

## II. FACTUAL FINDINGS

The undersigned recommends that this Court find the following facts. Huffington was originally convicted of two

counts of first degree felony murder in the Circuit Court for Caroline County on November 13, 1981. (Paper No. 11, Exhibit 25).[1] After a separate capital sentencing proceeding on December 1, 1981, the jury returned two sentences of death. (Exhibit 26, at 77). The conviction was reversed on trial error, and the proceeding remanded for a new trial. *Huffington v. State*, 295 Md. 1, 3, 452 A.2d 1211, 1212 (1982).

On remand, the case was transferred to the Circuit Court for Frederick County, Maryland. (Exhibit 3). Prior to trial, Petitioner moved to dismiss under the Double Jeopardy Clause and noted an interlocutory appeal from the denial of the motion. (Exhibit 3). The trial court's denial was affirmed. *Huffington v. State*, 302 Md. 184, 185-86, 486 A.2d 200, 201 (1985).

After trial, a Frederick County jury convicted Petitioner of two counts of first-degree murder, two counts of robbery with a deadly weapon, and related offences. (Exhibit 3, at 2). The jury returned death sentences for the murder convictions on May 1, 1984. (Exhibit 3, at 3). This conviction was affirmed on direct appeal. *Huffington v. State*, 304 Md. 559, 500 A.2d 272 (1985), *reconsideration denied sub nom.*

Huffington filed for post conviction relief following the conclusion of his direct appeal. (Exhibit 9). Additionally, he filed a supplement to the petition. (Exhibit 10) Among the grounds raised in his petition, Huffington argued that he received ineffective assistance of counsel in violation of the Sixth Amendment. He claimed that his defense counsel failed to present important defense witnesses whose testimony may have shown that Huffington was an unwilling participant in the crime.

After a hearing on the merits, the post conviction court vacated Petitioner's death sentences, but denied relief on the

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[1] All exhibits referenced herein are the exhibits attached to Paper No. 11, the Respondents Answer to the Order to Show Cause.

issue of guilt/innocence. (Exhibit 11). He then applied to the Court of Appeals for leave to appeal the partial denial of post conviction relief. (Exhibit 12). The Court of Appeals denied his application and motion for reconsideration. (Exhibits 13, 14, 15). The Supreme Court denied Huffington's petition for certiorari review of his post conviction petition. *Huffington v. Maryland*, 502 U.S. 985 (1991).

As stated above, Huffington's sentence was vacated by the post conviction court. Rather than commence another capital sentencing proceeding, the State of Maryland declined to seek reinstatement of the death sentences, and, instead sought terms of incarceration. The Circuit Court for Frederick County sentenced the Petitioner to two consecutive life terms on the murder convictions and lesser terms on other convictions. (Exhibit 3, at 5).

Subsequently, Petitioner filed a second petition for post conviction relief. (Exhibit 17). The Circuit Court denied the petition. (Exhibit 18). Huffington applied to the Court of Special Appeals for leave to appeal from the denial of post conviction relief. (Exhibit 19). The application was granted and the case remanded with orders to the Circuit Court to expound upon the denial of the petition. (Exhibit 20). A memorandum and order was subsequently issued and denied relief. (Exhibit 21). Petitioner again applied for leave to appeal to the Court of Special Appeals. (Exhibit 22). This reapplication was denied (Exhibit 23).

## III. ISSUES PRESENTED

Huffington raises the following grounds in support of his application for a writ of habeas corpus:

(1) That he was denied effective assistance of counsel as required by the 6th Amendment,

(2) That the trial court's decision to exclude prior testimony of Stephen Rassa violated Petitioner's right to due process and a fair trial,

(3) That his retrial constituted double jeopardy, and

(4) That he was unconstitutionally denied appellate review of his ineffective assistance of counsel claim.

## IV. DISCUSSION

### A. Petitioner's claim of ineffective assistance of counsel.

The Petitioner urges numerous grounds which indicate that he was denied effective assistance to counsel. These grounds will be addressed singularly, and in light of the reasonableness and prejudice requirements of *Strickland v. Washington*, 466 U.S. 668 (1984). Under *Strickland*, not only must a petitioner show that counsel's representation fell below an objective standard of reasonableness, but as a threshold showing, plaintiff must prove that the error resulted in actual prejudice. 466 U.S. at 697. The standard is whether "there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*, at 694. "When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Id.*, at 695. Additionally, a "but for" effect on the outcome does not show prejudice where subsequent events demonstrate the outcome was neither unfair nor unreliable. *Lockhart v. Fretwell*, 506 U.S. 364. Further, "a court must indulge a strong presumption that counsel's conduct falls within the range of reasonable professional assistance." 466 U.S. at 695.

#### (1) The absence of various defense witnesses at trial.

Petitioner argues that defense counsel's failure to procure the testimony of Stephen Rassa and other allegedly exculpatory defense witnesses denied him effective assistance of counsel. Regardless of any duties which may have been breached by defense counsel, an examination of the substantive testimony of these witnesses, viewed in the light most favorable to the prosecution, *see Jackson v. Virginia*,

443 U.S. 307, 318 (1979), reveals that a rational trier of fact could still conclude, beyond a reasonable doubt, that the Petitioner was involved as a felony murderer.

To demonstrate felony-murder the State is required to prove the underlying felony and that the death occurred in the perpetration thereof. Md. Code Ann. Art. 27 §§ 408-410 (1992); *Hook v. State*, 315 Md. 25, 553 A.2d 233 (1989). The undersigned has reviewed the evidence proffered by the Petitioner, (see Memorandum in Support of Petition for Habeas Corpus at 26-36). and recommends that this Court find that the evidence proffered is not exculpatory of a felony murder charge. Nowhere in the proffer does it state that the Petitioner did not accompany Deno Kanaras to the trailer. Nor does the proffer refute the fact that the petitioner was present when the burglary and robbery occurred.

Instead, Stephen Rassa's proffered testimony shows that although Kanaras may have been the engine behind the murders, it does not show that Huffington was an unwilling participant. Nor does the proffered testimony of Tom Wagner, Gary Aschenbach, William Palmisano, Norris Huffington, or Tom Hall reveal that Huffington was unwilling to participate. Although this testimony proffered may in fact cast doubt on whether Huffington or Kanaras engineered the attack, it cannot be said to cast doubt on the other's willingness to participate.

As stated by the petitioner, Rassa's testimony would show that Kanaras wanted to rob and kill Hudson. (Petitioner's Memorandum at 29-32). Tom Wagner's testimony would show that Kanaras still owned the murder weapon at the time of the killings. *Id.* at 32. Aschenbach's testimony would be that Kanaras was violent and involved with drugs. *Id.* William Palmisano's testimony would have been that Kanaras owned the murder knife. Norris Huffington and Tom Hall would have discredited Kanaras' testimony that he was Huffington's hostage and unwilling participant.

However, this evidence, examined in the light most favorable to the prosecution, *Jackson v. Virginia*, *supra*, sheds no light on Huffington's mental state at the time of the killings. None of these individuals support Huffington's claim that he was dragged along on a night of terror. Furthermore, the proffered testimony does not refute the fact that Huffington's fingerprints were present on the vodka bottle cracked over Diane Becker's head in the trailer and that Huffington's hair was found in close proximity to Diane Becker. Therefore, the evidence before the jury was still sufficient to convict Huffington of felony murder. Accordingly, this Court should hold that Huffington was not denied effective assistance of counsel because he has not demonstrated that he was prejudiced by any of his counsel's alleged errors.

**(2) Cross examination of Deno Kanaras.**

Petitioner's next claim of ineffective assistance of counsel is that defense counsel inadequately cross-examined Deno Kanaras. Specifically, Huffington argues that his counsel inadequately used transcripts of Kanaras' prior testimony during cross examination. Although state court findings of fact made in the course of deciding an ineffectiveness claim are subject to a presumption of correctness, both the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact. *Strickland*, 466 U.S. at 698. Finally, in making this determination, this Court must consider the totality of the evidence that was presented to the jury. *Strickland*, 466 U.S. at 695.

An attorney's tactical decision must be incompetent and prejudicial to constitute ineffective assistance of counsel. *Fitzgerald v. Thompson*, 943 F.2d 463 (4th Cir. 1991). The undersigned recommends a finding that the manner in which defense counsel used the transcripts at trial was a tactical one. The lead defense counsel had the trial transcripts from Huffington's first trial. He had read them and was familiar with them. At trial he decided to have his co-counsel, Robert

Rothenhoefer, conduct the cross examination of Kanaras. (Paper No. 11; Exhibit 35, at 120) This was because Rothenhoefer had twenty-four years of trial experience. *Id.* Mr. Drew believed that Rothenhoefer would do a solid job of cross-examination. *Id.*

This Court should further find that Rothenhoefer adequately cross examined Kanaras. Rothenhoefer spent eight to nine hours preparing to cross examine Kanaras and had prepared twelve to fifteen pages of cross examination questions prior to beginning cross examination of Kanaras. *Id.* at 81. Defense counsel was familiar with the transcripts of the prior Huffington trial. (Exhibit 33, p. 1881) (Defense counsel noted that he would refer to the transcript to impeach witness regarding the lighting at the trailer).

Rothenhoefer did not introduce the transcripts during the cross examination of Deno Kanaras. He did not want the transcripts into evidence. (*Id.*, at 1881). Rothenhoefer did however cross-examine Kanaras regarding how much liquor he drank, (Exhibit 33, p. 1869), the amount of cocaine ingested by Kanaras and Huffington on the night of the murders, *id.*, at 1886, and inquired into Kanaras' relationship with Huffington. *Id.*, at 1875. Further, defense counsel pointed out inconsistencies in statements given by Kanaras to the police and his father, *id.* at 1939, as well as discrepancies as to when he sold the gun. *Id.*, at 1941.

The cross examination of Kanaras was not so deficient as to be unreasonable. Accordingly, the undersigned recommends a finding that defense counsel's cross-examination of Deno Kanaras did not deny Huffington of his right to effective assistance of counsel.

**(3) Counsel's challenge of forensic evidence.**

Petitioner next argues that his counsel inadequately challenged the state's forensic evidence introduced at trial: the bullets, hair, fingerprints, and Marlboro box. In support, he relies on *Washington v. Murray*, 952 F.2d 1472 (4th Cir. 1991). In *Washington*, at 1477, the Fourth Circuit ordered an

evidentiary hearing on an ineffective assistance of counsel claim after concluding that counsel's failure to recognize the significance of, and subsequent failure to proffer, *facially exculpatory forensic evidence* fell below an objectively reasonable standard. In that case, defense counsel failed to introduce a reliable laboratory report which indicated that semen discovered at a rape scene did not match the defendant. *Id.*, at 1476 (emphasis added).

The case at bar presents a much different claim and factual scenario. Petitioner does not challenge counsel's failure to introduce reliable and exculpatory scientific evidence. Instead, he challenges counsel's allegedly ineffective cross-examination of the state's forensic experts and evidence. Petitioner asserts that an effective defense would have revealed that Agent Havekost's analysis of the bullets was flawed. The defense could have cast doubt that the bullets came from the same box, thus destroying the state's implication that the bullet's recovered were fired out of Petitioner's gun.

The undersigned recommends that this Court find that the Petitioner has failed to prove prejudice resulting from defense counsel's allegedly insufficient challenge of the forensic evidence. Huffington cannot establish that defense counsel would have cast a reasonable doubt of the conclusion that the bullets were from different boxes based on the composition of the bullets. Dr. Guinn, the defense expert testified that the presence of silver led to erroneous readings of arsenic levels. (Exhibit 36, at 356) He implied that since Agent Havekost could not read arsenic in the bullets, there was no match. However, any error in arsenic levels caused by silver is so small that it "could contribute to an arsenic error of one part per million, which is sufficiently below [the FBI's] limit of detection." (Exhibit 36, at 529). This Court should find that Dr. Guinn's testimony would not have placed a reasonable doubt on the bullet composition evidence.

Defendant also argues that he was denied effective assistance of counsel due to the alleged insufficient cross

examination of Agent Michael Malone, the state's hair expert. However, the undersigned recommends a finding that any alleged deficiencies in the cross examination of Agent Michael Malone, the hair expert, are insufficient to find prejudice. Agent Malone testified the hair sample from the crime scene was a microscopic match to Petitioner's hair. (Exhibit 32, at 1542). Furthermore, the state established that the hair was compared to Mr. Hudson, and there was no match. *Id.* Nor did the sample match Mr. Kanaras or Miss Becker. *Id.*, at 1542, 48). No cross-examination could refute this testimony.

Petitioner next asserts that defense counsel's failure to establish any evidence that his fingerprints may have been left at another time and that other fingerprints were present in the trailer prejudiced him. However, the fact that Petitioner's fingerprint was present on the vodka bottle is not disputed. Counsel could not establish the time at which the fingerprints were left. Petitioner does not offer evidence to prove his assertion; he only claims counsel should have made that argument. Therefore, this Court should find that these blanket assertions regarding the forensic evidence fail to satisfy the prejudice requirement of the *Strickland* test.

This Court should also find that Petitioner's claim with regards to the Marlboro box fails. The Fourth Circuit has held that failure to make oojections, in some circumstances, does not constitute ineffective assistance of Counsel. *See*, *Inge v. Procunier*, 758 F.3d 1010 (4th Cir.)(failure to object to exhibition of shotguns, whether deliberate or inadvertent, was not ineffective.), *cert. denied*, 474 U.S. 833 (1985). Moreover, defense counsel waived any chain of custody objection with regards that evidence in exchange for the State's agreement to exclude admissible autopsy photographs. (Exhibit 31, p. 1495-6). This Court must be reluctant to second guess tactics of trial lawyers. *Goodson v. United States* 564 F.2d 1071, 1072 (4th Cir. 1977). In view of the damaging nature of the autopsy photographs, this Court should find that defense

counsel's waiver of a chain of custody objection as a trial tactic was quite reasonable.

**(4) Counsel's alleged failure to investigate and present witness on behalf of the Petitioner.**

In light of the discussion outlined in Part 1A(1), supra, the undersigned recommends a finding that the Petitioner has suffered no prejudice from an alleged failure to investigate witnesses named on his behalf. Even had all named witnesses been interviewed and testified, enough evidence is present in the record to support the jury's guilty verdict. Accordingly, Petitioner has not been afforded ineffective assistance of counsel in violation of the Sixth Amendment.

**(5) The cumulative effect of defense counsel's alleged errors**

Petitioner makes one final argument in his claim of ineffective assistance of counsel in which he relies on *Bowers v. State*, 320 Md. 415, 578 A.2d 734 (1990).[2] He urges this Court to find ineffective assistance of counsel on the grounds of cumulative effect of errors by trial counsel. *See*, *Bowers*, at 421, 428 A.2d at 741. Several striking differences are readily apparent between *Bowers* and the instant case. First, in the instant case, the forensic evidence in the form of hair samples and fingerprints conclusively placed the Petitioner at the scene; said evidence was not exculpatory. Additionally, as discussed above, the cross examination of Kanaras did not constitute ineffective assistance of counsel. Moreover, the witnesses named by Petitioner do not provide evidence exculpatory of the felony murder charge. Accordingly, this Court should find no ineffective assistance of counsel based on the cumulative effect of errors by trial counsel.

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[2] The undersigned notes that this Court is not bound by the *Bowers* decision.

**B. The trial courts exclusion of Stephen Rassa's prior testimony.**

Petitioner next argues that he is entitled to a writ of habeas corpus because his due process rights were violated when the trial court excluded a transcript of Stephen Rassa's prior testimony. In support, he cites several federal cases in which trial courts admitted similar testimony.

The undersigned recommends that this court find the following facts which relate to the testimony of Stephen Rassa. Stephen Rassa was a state's witness at the earlier trial of Deno Kanaras; he testified during the state's rebuttal. *Huffington v. State*, 304 Md. at 564-65. The thrust of Rassa's testimony was that a few days before the incident in question, Kanaras was still involved with drugs. *Id.* Rassa then testified of a visit made by him and Kanaras to the victims for the purpose of purchasing cocaine. *Id.* Rassa testified at Kanaras' trial that Kanaras "said he wouldn't mind robbing Joe Hudson and killing him." *Id.* Rassa further stated that Kanaras had entered the victim's trailer armed with a gun and a knife five days before they were actually killed. *Id.* Huffington asserts that Rassa's testimony proves that Rassa's testimony was highly probative of Kanaras' guilt. (Petitioner's Memorandum, at 49).

The exclusion of Stephen Rassa's prior testimony does not violate Petitioner's right to due process unless it "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Romano v. Oklahoma*, 114 S.Ct. 2004, 2012 (1994). The trial court excluded the transcript because it was hearsay evidence, and the Court of Appeals affirmed this ruling based on existing Maryland and constitutional law. *Huffington v. State*, 304 Md. at 564-74, 500 A.2d at 274-79 (1986). Specifically, the Court of Appeals held that the state could not adequately cross examine Rassa regarding this testimony, and therefore, it did not fit within the hearsay exception for prior testimony. *Id.* Since the transcript was inadmissible evidence, its exclusion cannot violate the due process rights of the Petitioner unless

the trial was infected with unfairness. As summarized above, Rassa's testimony incriminates Kanaras, but it does not exculpate Huffington. Accepted as fact, Rassa's testimony does not show that Huffington was not present at the time of the murders. Nor does his testimony show that Huffington was not a willing participant. It only further incriminates Kanaras, who was already convicted of murder. The undersigned therefore recommends a finding that the exclusion of Rassa's prior testimony did not infect Huffington's trial with unfairness of a constitutional magnitude.

### C. The Frederick County retrial on the felony murder trial

Huffington has raised two double jeopardy arguments in his petition. He argues that the retrial after remand from the Court of Appeals violated the Double Jeopardy Clause of the Fifth Amendment. He claims that the second trial was based on exactly the same evidence and arguments as the prosecution of the premeditated murder charge of which he was acquitted in the first trial. Secondly, Huffington argues that because of the broad language of the second indictment, he was effectively subjected to a second prosecution for premeditated murder.

His first double jeopardy claim is procedurally barred in this Court. In *Harris v. Warden*, 489 U.S. 255 (1989) the Supreme Court held that the "plain statement" rule of *Michigan v. Long*, 463 U.S. 1032 (1983) applies to habeas proceedings. Therefore, a procedural default will not bar consideration of a federal claim on habeas review unless the last state court rendering a judgment in the case clearly and expressly states that its judgment rests on a state procedural bar. In the instant case, the Maryland Court of Appeals, the last court to address this issue, held this claim to be procedurally barred due to the Petitioner's failure to raise the issue properly at trial, and, therefore, the claim was "not consider[ed]" due to petitioner's failure to comply with Maryland Rule 8-204(b)(2). *Huffington v. State*, 304 Md. at

585-86, 500 A.2d at 285-86; *See Coleman v. Thompson*, 501 U.S. 2546 (1991). *See also*, *Whitley v. Bair*, 802 F.2d 1487 (4th Cir. 1986)("[T]he doctrine of procedural default applies in state post conviction appeals). Moreover, the Petitioner has not shown cause for the default and cannot show actual prejudice. *Wainwright v. Sykes*, 433 U.S. 72 (1977). Accordingly, this Court should hold that the Petitioner has procedurally defaulted his claim and is therefore barred from considering whether the state's presentation of evidence violated the Double Jeopardy Clause. *Harris v. Reed*, 489 U.S. 255 (1989).

Petitioner's second double jeopardy claim is also without merit. Huffington was originally convicted of felony murder and acquitted of premeditated murder. The second indictment used by the state for Huffington's retrial was the short form indictment for murder. Huffington's second trial does not violate the double jeopardy clause so long as premeditated murder and felony murder contain elements not found in the other. *See Blockburger v. United States*, 284 U.S. 299 (1932). However, the short form indictment for murder used in this case allows the prosecutor to proceed on "the theory of premeditated murder, or felony murder or both." *Ross v. State*, 308 Md. 337, 519 A.2d 735 (1987). The Petitioner was tried for and found guilty of felony murder theory at the retrial. (Respondents' Exhibit 33 at 2067-68). Therefore, a finding that the retrial on felony murder grounds was proper is recommended.

**D. Denial of the Application for Leave to Appeal**

Huffington's final claim is that he has been denied due process and equal protection of the laws by Maryland's system of discretionary appeals from denials of post conviction relief. Huffington argues that he has not received meaningful appellate review of his ineffective assistance of counsel claims. In *Hunt v. Nuth*, 57 F.3d 1327 (4th Cir. 1995), the Court rejected a habeas petitioner's assertion that Maryland provides unequal access to appellate review without a rational basis. The Court stated that the petitioner created

two classes of claims, rather than two classes of persons, and argued that these types of claims must be treated equally by Maryland. *Id.*, at 1335-36. It held that the state "has a legitimate interest in conserving judicial resources and need not provide the same review for each type of claim, particularly when Maryland already provides defendants with more than the constitutional minimum of opportunities for review. Therefore we reject [petitioner's] claim that Maryland's discretionary post-conviction review system violates the equal protection clause." *Id.* Accordingly, this Court should find that Huffington has not been denied equal protection of the law.

## V. CONCLUSION AND RECOMMENDATION

In light of the foregoing Memorandum and the reasons set forth therein, the undersigned recommends that the petition for a writ of habeas corpus be denied.

FILED February 27,1996

/s/ William Connelly
William Connelly
United States Magistrate Judge

cc: Judge Nickerson
Clerk's Office
David Overlock Stewart
Gwynn Kinsey, Esq.

## APPENDIX E

## IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

Civil Action No. WMN-94-3059

November 18, 1996

JOHN N. HUFFINGTON

v.

EUGENE M. NUTH

### ORDER

Before the Court is the Report and Recommendation of United States Magistrate Judge William Connelly ["Report"], entered February 27, 1996 (Paper No. 18). Petitioner filed Objections (Paper No. 19). After a *de novo* review of the entire matter, this Court determines that the Report and Recommendation of Magistrate Judge Connelly should be affirmed and adopted. Some brief comment, however, is required as to Petitioner's ineffective assistance of counsel claim.

Petitioner asserts that the Report mischaracterizes the nature of his defense. The Report states that Petitioner relied on the defense that he was an "unwilling participant" in the crimes that were actually committed by Deno Kanaras. In reality, Petitioner has argued that he was not present at the time of the crime.[1] The Court notes that while Magistrate

[1] The source of this misunderstanding was apparently an inaccurate statement made by the State in its answer to the petition. This statement was later corrected by side letter. *See* Objections, Exhibit C.

Judge Connelly may have been misled as to the nature of Petitioner's defense, he concluded that the evidence now offered by Petitioner not only fails to show that Petitioner was not a willing participant, but also "does not show that Huffington was not present at the time of the murders." Report at 14. *See also Id.* at 6 ("Nor does the proffer refute the fact that the petitioner was present when the burglary and robbery occurred.").

Petitioner also asserts that although Magistrate Judge Connelly's initial summary of *Strickland's*[2] "prejudice prong" was correct, Magistrate Connelly actually applied an overly strict standard. While Magistrate Judge Connelly may have inadvertently overstated the burden in his Report, the undersigned, after reviewing the extensive record in this matter, particularly the trial transcript and the transcript and materials from the extensive post conviction hearings, Answer to Petition - Exhibits 28-38, concludes that Magistrate Judge Connelly's analysis of the alleged errors of trial counsel is sound. Several of the alleged errors, such as the decision to have the more experienced co-counsel, Mr. Rothenhoefer, handle the cross-examination of Kanaras, the waiver of a chain of custody challenge in exchange for an agreement from the Government that highly prejudicial autopsy photographs not be admitted, and the decision to wait until the last moment to attempt to subpoena Mr. Rassa in order to lessen the likelihood that he would flee the jurisdiction, were reasonable tactical decisions. As to the quality of the cross examination of Kanaras, the Court finds that trial counsel's preparation for, and execution of, that examination was reasonable. As to those aspects of Petitioner's claim where Magistrate Judge Connelly relied upon a prejudice analysis, the undersigned, based upon his own review of the record, concludes that, in light of the other evidence against Petitioner, that there is not "a reasonable probability that the outcome of the proceeding would have been different but for the deficient performance, a

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[2] *Strickland v. Washington*, 466 U.S. 668, 694 (1984)

'reasonable probability' being one 'sufficient to undermine confidence in the outcome.'" *Washington v. Murray*, 952 F.2d 1472 (4th Cir. 1991)(quoting *Strickland*, 466 U.S. at 687-88, 694).

Accordingly, IT IS this 18th day of November, 1996, by the United States District Court for the District of Maryland,

ORDERED:

1. That the Report and Recommendation of United States Magistrate Judge William Connelly, filed February 27, 1996 (Paper No. 18) is AFFIRMED and ADOPTED;

2. That Petitioner's Objections filed March 11, 1996 (Paper No. 19) are OVERRULED;

3. That Petitioner's Petition for Writ of Habeas Corpus is DISMISSED with prejudice;

4. That this case is hereby CLOSED;

5. That the Clerk of the Court shall mail copies of this Order to all counsel of record.

/s/ William M. Nickerson
William M. Nickerson
United States District Judge

**APPENDIX F**

**UNITED STATES COURT OF APPEALS**
**FOR THE FOURTH CIRCUIT**

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No. 96-7930
(CA-94-3059-WMN)

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FILED: April 28, 1998

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JOHN NORMAN HUFFINGTON
Petitioner - Appellant

v.

EUGENE NUTH, Warden; ATTORNEY GENERAL OF THE STATE OF MARYLAND
Respondents - Appellee

---

On Petition for Rehearing with Suggestion for Rehearing In Banc

---

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Patricia S. Connor
CLERK

**APPENDIX G**
**IN THE**
**CIRCUIT COURT FOR FREDERICK COUNTY**

---

Crims. No. 6373, 6374

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STATE OF MARYLAND
v.
JOHN NORMAN HUFFINGTON

---

Volume XI of XI Volumes
9:13 a.m., Nov. 16, 1983-12:18 p.m., Nov. 19, 1983
Pages 1784-2080

Witnesses Perrotta and Kanaras (as reflected on page V of index)


| | |
|---|---|
| Motion for judgement of acquittal | 1946 |
| Motion renewed | 1966 |
| Instructions discussion | 1972 |
| Instructions | 1982 |
| Argument, State | 2009 |
| Argument, defense | 2020 |
| Rebuttal | 2037 |
| Notes from jury | 2045, 2046, 2051, 2054 |
| Verdict | 2067 |

* * *

THE COURT: Well, of course, gentlemen, this is a different situation from the prior argument on the motion which was made by the State and granted by the Court. The whole thrust of the cases in this area is that the right of cross-examination be fully afforded, and if it has not been afforded, then it is not only a violation of Article 21 of the Maryland Constitution but also before the amendment to the United States Constitution. It's clear from the proffered testimony in this case, and I find as a fact, that in the trial in which the Rassa transcript is sought to be used, Mr. Rassa was the State's witness, and accordingly, to grant your motion I would be depriving the State of its right to cross-examine fully Mr. Rassa in this case, which is a different case from the present case. The case in which the transcript is from, as I understand it, is the *State v. Kanaras* rather than the *State v. Huffington*, and so the situation is entirely different from the situation which caused me to grant the State's motion in connection with the Bognani testimony. Accordingly, the motion is denied.

* * *

## CERTIFICATE

I hereby certify that proceedings in the foregoing pages 988 through 2080 were transcribed from tape by me in a complete and accurate manner, (excepting pages 1299-1302 [James M. Green]), and that this verbatim record constitutes the Official Record of Trial in the case of *State of Maryland v. John Norman Huffington*, Nos. 6373 and 6374 Criminal Trials, in the Circuit Court for Frederick County, Maryland, heard before the Honorable William W. Wenner, Judge, on November 11, November 14, November 15, November 16, November 17, November 18 and November 19, 1983, in the Frederick County Court House, Frederick, Maryland.

11/26/84

/s/ Elizabeth K. Hale
Elizabeth K. Hale
Official Reporter

## APPENDIX H

## IN THE
## COURT OF APPEALS OF MARYLAND

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NOS. 64 and 133

SEPTEMBER TERM, 1984

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JOHN NORMAN HUFFINGTON

v.

STATE OF MARYLAND

---

Murphy, C.J.
Smith
Eldridge
Cole
Rodowsky
Couch
McAuliffe,

JJ.

---

Opinion by Smith, J.
Eldridge, Cole and McAuliffe, JJ., dissent

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Filed: November 13, 1985

We shall affirm the conviction and sentence of John Norman Huffington in this, his third trip to this Court, the second after a death sentence. His first trip was reported in *Huffington v. State*, 295 Md. 1, 452 A.2d 1211 (1982), where we reversed and remanded for a new trial. Upon the remand after that reversal the case was removed to the Circuit Court

for Frederick County for trial. In *Huffington v. State*, 302 Md. 184, 486 A.2d 200 (1985), we rejected his contention that to again try him would place him in double jeopardy. After our per curiam order in that case (but before the filing of the opinion) Huffington was tried in the Circuit Court for Frederick County. A jury convicted him of two counts of first degree murder, breaking and entering, and handgun offenses. The same jury sentenced him to death for each murder. The case reaches us under the provisions of Maryland Code (1957, 1982 Repl.Vol.) Art. 27, § 414 providing for automatic review by this Court whenever the death penalty is imposed.

The facts surrounding the incident leading to Huffington's conviction are fully set forth in our earlier opinion. We shall here set forth only such facts as are necessary to a clear understanding of each of the issues presented by Huffington in his appeal. We shall consider his contentions seriatim.

i. Refusal to admit the testimony given by Rassa at the trial of Kanaras

Deno Kanaras was the alleged accomplice of Huffington in the incidents here in question. Kanaras was convicted by a Kent County jury of felony murder, theft, and daytime housebreaking. See *Kanaras v. State*, 54 Md.App. 568, 460 A.2d 61, *cert. denied*, 297 Md. 109 (1983). At Kanaras' trial Stephen Rassa testified in rebuttal as a State's witness. Prior to that rebuttal testimony Kanaras had testified that he had been free from drugs for some time before the homicides in question. The purport of Rassa's testimony was that a few days before the incident in question Kanaras was still involved with drugs. Rassa told of a visit made by him and Kanaras to the homicide victims for the purpose of purchasing cocaine. At Kanaras' trial Rassa testified that Kanaras "said he wouldn't mind robbing Joe Hudson and killing him." Rassa said that five days before Hudson and Becker, the victims in the case at bar, were actually killed, when Rassa and Kanaras approached Hudson's trailer for the purpose of

purchasing cocaine, Kanaras entered first armed with a gun and with a knife.

After laying a foundation of unsuccessful attempts to subpoena Rassa as a witness, Huffington offered the record of Rassa's testimony at the Kanaras trial in Kent County. He sought its admission as prior evidence to establish that Kanaras might have killed the victims in the case at bar. The trial judge denied admission, stating:

> "The whole thrust of the cases in this area is that the right of cross-examination be fully afforded, and if it has not been afforded, then it is not only a violation of Article 21 of the Maryland Constitution but also before [sic] the amendment to the United States Constitution. It's clear from the proffered testimony in this case, and I find as a fact, that in the trial in which the Rassa transcript is sought to be used, Mr. Rassa was the State's witness, and accordingly, to grant your motion I would be depriving the State of its right to cross-examine fully Mr. Rassa in this case, which is a different case from the present case. The case in which the transcript is from, as I understand it, is the *State v. Kanaras* rather than the *State v. Huffington*, and so the situation is entirely different from the situation which caused me to grant the State's motion in connection with the Bognani testimony. Accordingly, the motion is denied."

There is no dispute here on the issue of Rassa's availability as a witness.

The rule applicable to prior testimony was set forth for the Court by Chief Judge Murphy in *Crawford v. State*, 282 Md. 210, 383 A.2d 1097 (1978):

> "Our predecessors have consistently held that testimony taken at a former trial may as a general rule be admitted at a subsequent trial where it is satisfactorily shown that the witness is unavailable

to testify. *Contee v. State*, 229 Md. 486, 184 A.2d 823 (1962); *Bryant v. State*, 207 Md. 565, 115 A.2d 502 (1955); *Hendrix v. State*, 200 Md. 380, 90 A.2d 186 (1952). These cases generally recognize that where an opportunity was afforded to the accused to cross-examine the witness at the former trial, there is no violation of the state or federal constitutional right of confrontation. The rule has generally been applied without distinction between the admissibility of testimony given at a former trial and testimony given at a preliminary hearing since, as Professor McCormick states:

> 'If the accepted requirements of the administration of the oath, adequate opportunity to cross-examine on substantially the same issue, and present unavailability of the witness, are satisfied then the character of the tribunal and the form of the proceedings are immaterial, and the former testimony should be received. . . .' McCormick, *Evidence* § 258 (2d ed. 1972).

Other text writers are in accord. *See* 2 *Jones on Evidence* § 9.22 (6th ed. 1972); 3 *Wharton's Criminal Evidence* § 650 (13th ed. 1973.)" 282 Md. at 214-15, 383 A.2d at 1100.

The rule was recognized ninety years ago in a criminal context by the Supreme Court. See *Mattox v. United States*, 156 U.S. 237, 15 S.Ct. 337, 39 L.Ed. 409 (1895). The Court discussed such testimony in the context of a claim that admission of testimony would violate the constitutional provision relative to confrontation of witnesses:

> "The primary object of the constitutional provision in question was to prevent depositions or *ex parte* affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a

personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief. There is doubtless reason for saying that the accused should never lose the benefit of any of these safeguards even by the death of the witness; and that, if notes of his testimony are permitted to be read, he is deprived of the advantage of that personal presence of the witness before the jury which the law has designed for his protection. But general rules of law of this kind, however beneficent in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case. To say that a criminal, after having once been convicted by the testimony of a certain witness, should go scot free simply because death has closed the mouth of that witness, would be carrying his constitutional protection to an unwarrantable extent. The law in its wisdom declares that the rights of the public shall not be wholly sacrificed in order that an incidental benefit may be preserved to the accused." 156 U.S. at 242-43, 15 S.Ct. at 339-40, 39 L.Ed. at 411.

On the issue in question see Annot., 15 A.L.R. 495 (1921), and the supplements thereto, 79 A.L.R. 1392 (1932), 122 A.L.R. 425 (1939), and 159 A.L.R. 1240 (1945). Obviously, as pointed out in 15 A.L.R. at 559, there can be no constitutional objection to admission of evidence on *behalf* of an accused in a criminal proceeding. The further observation is made that in admitting testimony on *behalf* of an accused courts generally have followed the rules which they have

adopted with respect to permitting or rejecting testimony in favor of the prosecution.

On the problem at hand E. Cleary, *McCormick's Handbook of the Law of Evidence*, § 254 (3d ed. 1984) states:

> "Usually called 'former testimony', this evidence may be classified, depending upon the precise formulation of the rule against hearsay, as an exception to the hearsay prohibition on the one hand, or as a class of evidence where the requirements of the hearsay rule are complied with, on the other. The former view is accepted generally by the courts, rules, and textwriters; the latter was espoused by Wigmore." *Id.* at 759-60.

On cross-examination McCormick states in § 255:

> "More important, and more often drawn in question, is the requirement that the party against whom the former testimony is now offered, or a party in like interest, must have had a reasonable opportunity to cross-examine. Actual cross-examination, of course, is not essential, if the opportunity was afforded and waived. The opportunity must have been such as to render the conduct of the cross-examination or the decision not to cross-examine meaningful in the light of the circumstances which prevail when the former testimony is offered." *Id.* at 761-62.

McCormick also mentions another frequent issue in § 256, that of identity of parties:

> "[T]he natural next step is to recognize, as progressive courts have done, that neither identity of parties nor privity between parties is essential. These are merely means to an end. Consequently, if it appears that in the former suit a party having a like motive to cross-examine about the same matters as the present party would have, was

> accorded an adequate opportunity for such examination, the testimony may be received against the present party. Identity of interest in the sense of motive, rather than technical identity of cause of action or title, is the test." *Id.* at 765.

The importance of cross-examination is explained by Martin, *The Former-Testimony Exception in the Proposed Federal Rules of Evidence*, 57 Iowa L.Rev. 547 (1972):

> "Given the faith which the Anglo-American adversary system places in the efficacy of cross-examination, it is not surprising that the most important feature of the former-testimony exception is that which requires such testimony to have been given in a situation where an opportunity existed to utilize that truth-testing device. The former-testimony exception to the hearsay rule is unique in this respect, as no other exception makes cross-examination a requirement for admissibility, and it is not usually discussed in connection with evidence admitted under other exceptions. It was this opportunity to cross-examine which led Wigmore to characterize former testimony as unobjectionable under the hearsay rule, rather than as admissible as one of its exceptions. In order to ensure the reliability of former testimony, the proposed Federal Rules retain the requirement that the opponent be given the opportunity to develop the testimony by cross-examination." § *Id.* at 553-54.

Professor Martin says, "[The] crucial question is whether, given that the opponent can not now cross-examine the witness, the examination on the prior occasion was fairly equivalent to cross-examination in the present situation." *Id.* at 556.

Fed.R.Evid. 804(b)(1) states:

"(b) Hearsay exceptions.—The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

> (1) Former testimony.—Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination."

The issue of cross-examination is discussed in J. Weinstein & M. Berger, 1 *Weinstein's Evidence* ¶ 804(b)(1)[02]:

> "The prime guaranty of reliability in the case of prior testimony or depositions resides in their having been subjected to cross-examination prior to the present trial. When this condition and the requirement of an oath are met, the character of the tribunal before which the former trial was held is immaterial. 'If the tribunal was empowered to compel cross-examination, or did in fact compel cross-examination, the prior testimony should be admissible.' Similarly in the case of depositions, the condition of cross-examination is satisfied if the deposition is taken 'before an officer authorized by law to take depositions and empowered to compel cross-examination. If the opportunity to cross-examine was lacking the prior testimony must be excluded. Even should it be determined that the tribunal conducting the original hearing lacked jurisdiction, admission of the prior testimony should depend on 'whether the sworn statements of the witness, now dead or unavailable, about the facts of which he had knowledge, were made under such circumstances of opportunity and motive for cross-

> examination as to make them sufficiently trustworthy to be used in the effort to ascertain the truth.'
>
> "Actual cross-examination is not required, 'but merely *an opportunity to exercise the right to cross-examine if desired*.' Representation by the same counsel at both trials is not required. If the party against whom the previous statement is now offered is the party against whom the testimony was previously offered, it is usually compatible with fair practice to make him bear the consequences of any deficiencies in the cross-examination or decision not to exercise that right. But situations may arise where because of particular circumstances, the existence of an opportunity to cross-examine would not have resulted in any testing of the reliability of the previous statement, where the conduct of the cross-examination or the decision not to cross-examine is not 'meaningful in the light of the circumstances which prevail when the former testimony is offered.'" *Id.* 804-74 to -76. (Emphasis in original.)

The case relied upon by the State that is closest to the factual situation before the Court is *Commonwealth v. Meech*, 380 Mass. 490, 403 N.E.2d 1174 (1980). There the defendant attempted to introduce at his trial testimony given by a witness for the prosecution before the grand jury. The court said:

> "The common model for the exception is one where the prior testimony was given by a person, now unavailable, in a proceeding addressed to substantially the same issues as in the current proceeding, with reasonable opportunity and similar motivation on the prior occasion for cross-examination of the declarant by the party against whom the testimony is now being offered. . . .

"The usual formula would not be fulfilled if grand jury testimony were subsequently offered against the indicted defendant, for he would not have had a chance to cross-examine. See *United States v. Fiore*, 443 F.2d 112, 115 & n. 3 (2d Cir.1971), *cert. denied*, 410 U.S. 984 (1973). Nor is it nominally fulfilled where, as here, the defendant offers the testimony against the Commonwealth, for the Commonwealth was not in the position of a cross-examiner at the grand jury hearing; rather it was presenting the testimony through direct examination. However, it has been recommended by commentators, and on occasion held by courts, that a party's having tendered the testimony on direct should serve as the equivalent for the present purpose of his having cross-examined upon it. There is some support for this view as to grand jury testimony on the theory, perhaps, that the government should be considered bound to the trustworthiness of the evidence it chose to present to the grant jury as a basis for an accusation of crime. (See, however, note 12 *infra*.)

"But even if the proposition were accepted that the defendant might in some circumstances use the grand jury testimony of a now unavailable witness at trial, McDonald's testimony would still be of dubious acceptability. For it is an important ground of this hearsay 'exception' that there be substantial identity between the issues at the earlier and later proceedings—this to ensure 'that the former handling of the witness was the equivalent of what would now be done if the opportunity were presented.' Where this similarity is absent, the testimony will not be fortified in the material respect—that is, in its relation to the particular proposition sought to be proved in the later proceeding. See *United States v. Wingate*, 520 F.2d 309, 316 (2d Cir.1975); *State v. Augustine*, 252 La.

983, 999 (1968). The problem is encountered here. The Commonwealth's purpose in examining McDonald before the grand jury was not to inquire into the defendant's criminal responsibility; it was to provide eyewitness proof about the defendant's possession of the supposed murder weapon in the vicinity of the crime near the time of death." 380 Mass. at 494-96, 403 N.E.2d at 1177-78.

*United States v. Atkins*, 618 F.2d 366 (5th Cir.1980), is instructive. The court there said:

> "Admission of Inglet's testimony, given during government cross-examination of him in a December 19, 1978, *James*[1] hearing, also was not erroneously denied. Fed. R.Evid. 804(b)(1) permits admission of former testimony if the declarant is unavailable at trial and 'if the party against whom the testimony is now offered . . . had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.' The defendant sought to use Inglet's testimony that his source of cocaine in Miami was a man named Robert, whose last name he did not know, in order to establish that Inglet was dealing with someone other than Robert Atkins, whose name was known to Inglet. Defense counsel for Atkins did not participate in the James hearing, and the hearing did not concern Atkins but only some of his codefendants. In addition, the government did not contend that Atkins was the Miami supplier being discussed by Inglet in the *James* hearing but rather that he was the contact man. Thus, the government did not have the motivation to question Inglet in order to make him acknowledge that the Robert of

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[1] "*James*" refers to *United States v. James*, 590 F.2d 575 (5th Cir.1979) (en banc) pertaining to the introduction of co-conspirators' statements.

> whom he spoke in the *James* hearing was in fact Atkins. Accordingly, Inglet's former testimony did not meet the requirements of 804(b)(1) for admission, and his challenge to its exclusion by the judge is without merit. *See, e.g., Peterson v. United States*, 344 F.2d 419, 425 (5th Cir.1965)." 618 F.2d at 373.

We find *Atkins* persuasive. It follows along with the authorities we have heretofore quoted. When the State presented the testimony of Rassa at Kanaras' trial it was in a different context and for a different purpose from that for which Huffington desires to offer it in the case at bar.[2] The motivation on the part of the State for questioning Rassa was entirely different at that trial from the motivation the State would have had to question Rassa on cross-examination at Huffington's trial had Rassa been present as a live witness to offer the testimony sought to be introduced. Much has been written on the importance of cross-examination. In the words of the federal rule the party against whom the testimony is now offered did not have at the time of Kanaras' trial a similar motive in developing the testimony of Rassa. Given

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[2] We take cognizance of the fact that the dissent differs with our view as to the purpose for which the Rassa testimony was offered at the trial of Kanaras. We point out that in *Kanaras v. State*, 54 Md.App. 568, 460 A.2d 61, *cert. denied*, 297 Md. 109 (1983), Judge Alpert said for the Court of Special Appeals:

> "In the instant appeal, the rebuttal testimony clearly explained and replied to the evidence which had been offered by the appellant in his defense. Kanaras had agreed to the accuracy of the language of the statement which he had given Saneman, which included the response that 'I never sold drugs. I always bought them.' Thus, the State was entitled to prove that Kanaras had been involved in drug transactions as a seller. Judge Rasin correctly observed that the central matter at issue in the case was drugs. When the defendant asserted that he was not a drug dealer, the State was entitled to rebut this evidence." 54 Md.App. at 594, 460 A.2d at 75-76.

the wide discretion which trial judges have in admitting evidence, we find no error on the part of the trial judge.

ii. Mitigating factor of not being the sole proximate cause of the victim's death

Code (1957, 1982 Repl.Vol.) Art. 27, § 413(g)(6) provides that a mitigating factor which a sentencing authority may find to exist is that the act of the defendant was not the sole proximate cause of the victim's death. Huffington contends that because his cohort, Kanaras, was convicted of felony murder in the death of Becker (one of the individuals found to have been murdered by Huffington), then Huffington is entitled as a matter of law to an instruction in his favor on this mitigating factor.

There is both a short and a somewhat longer answer to Huffington's contention. The short answer is that at no time did he request such an instruction. Not having requested such an instruction, the point is deemed waived. Maryland Rule 885.

A somewhat longer answer is that the sentencing authority, in this instance the jury, would be expected to return its finding based upon the evidence adduced before it. Evidence of Kanaras' conviction was not adduced. Had it been, the finding made by the jury at Kanaras' trial would not be binding upon the jury at Huffington's trial because it would not be based upon the same evidence.

The real answer is that contained in *Evans v. State*, 304 Md. 487, 499 A.2d 1261 (1985), where Judge Eldridge said for the Court:

> "[W]e conclude that the General Assembly intended the words 'proximate cause' to apply only to direct physical causes of the victim's death, and not to acts of a principal in the second degree or an accessory before the fact which aided or abetted the act

directly causing death." 304 Md. at 534, 499 A.2d at 1285.

Footnote 16 of that opinion provides further clarification:

> "The type of situation which the Legislature likely had in mind by the language of § 413(g)(6) is illustrated by the following. If the perpetrator inflicts a serious wound under circumstances that would justify a conviction for murder if death should ensue, and death does ensue partly by reason of negligent medical treatment or refusal of the victim to accept medically recommended care, the perpetrator will not be excused from liability for the murder. *See DeVaughn v. State*, 232 Md. 447, 194 A.2d 109 (1963), *cert. denied*, 376 U.S. 927, 84 S.Ct. 693, 11 L.Ed.2d 623 (1964). Nevertheless, in a capital punishment case there would exist as a mitigating factor an additional proximate cause of death.
>
> "We need not in this case, however, explore the range or scope of acts which might fall within the language of § 413(g)(6). We go no further than our holding that the act of a principal in the second degree or accessory before the fact is not what the Legislature had in mind." 304 Md. at 534-35, 499 A.2d at 1286.

Huffington simply was not entitled to such an instruction.

iii. The presentence investigation report

Code (1957, 1982 Repl.Vol., 1984 Cum.Supp.) Art. 41, § 124(d), adopted by Ch. 297 of the Acts of 1983 and effective July 1, 1983, provides:

> "In any case in which the death penalty is requested under Article 27, § 412, a presentence investigation, including a victim impact statement, shall be completed by the Division of Parole and

> Probation, and shall be considered by the court or jury before whom the separate sentencing proceeding is conducted under Article 27, § 413."

Code (1957, 1982 Repl.Vol.) Art. 27, § 413(c)(1)(iv) states that evidence admissible in a capital sentencing proceeding includes "[a]ny presentence investigation report."

Huffington contends that the trial court erred in admitting two portions of the presentence investigation report. The first concerns that portion of institutional history pertaining to infractions not leading to criminal prosecutions committed while Huffington was incarcerated prior to trial. The second pertains to the admission of Huffington's version of the facts pertaining to his activities at the times here pertinent.

For reasons to be hereafter developed we find Huffington's contentions to be without merit. There is another reason for overruling his contentions, however. The presentence investigation came in without objection. It is true that when the presentence investigation was being considered by the trial judge Huffington made specific objections to the portions of the report to which he now objects. However, the report was received in evidence without objection on behalf of Huffington. The record reflects:

> "Cassilly [Assistant State's Attorney]: Excuse me, Your Honor, could we . . .now that we've finally gotten our presentence put together, can we distribute this to the Jury at this point?
>
> "Court: You'll want to put that in? Yes.
>
> "Cassilly: Yes, please.
>
> "Drew [for the defense]: I have no objection, Your Honor, if you want. . . .
>
> "Court: All right, it will be received and may be distributed to the Jury. (St.Ex. 5 admitted into evidence. PSI, with deletions; photostat.)

"Drew: Your Honor, I don't have any problem with it being distributed but I'd ask that the Court instruct the Jury not to begin reading it or anything until . . . I'd like them to pay attention to my presentation rather than reading the PSI."

a. The institutional history

The section of the presentence investigation report pertaining to institutional history states:

"On or about 12/6/83 the defendant, John Norman Huffington was cited for 1) refusing to obey a direct order and 2) creating a security threat. The defendant received ten days in disciplinary isolation for each of those infractions.

"Evidently the defendant offered resistance to Deputy Minnick while being searched. As to the second infraction the defendant apparently interfered with the searching of other inmates in the cell block."

*Bartholomey v. State*, 267 Md. 175, 297 A.2d 696 (1972), involved the Maryland death sentence cases remanded to us by the Supreme Court of the United States for reconsideration in the light of its holding *in Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). In discussing the procedure to be followed by trial judges in re-sentencing those defendants, Chief Judge Murphy said for the Court:

"[T]o aid the sentencing judge in fairly and intelligently exercising the discretion vested in him, the procedural policy of the State encourages him to consider information concerning the convicted person's reputation, past offenses, health, habits, mental and moral propensities, social background and any other matters that a judge ought to have before him in determining the sentence that should be imposed. *Skinker v. State*, 239 Md. 234, 210

A.2d 716 (1965); *Scott v. State*, 238 Md. 265, 208 A.2d 575 (1965); *Costello v. State*, 237 Md. 464, 206 A.2d 812 (1965); *Driver v. State*, [201 Md. 25, 92 A.2d 570 (1952)]; *Baker v. State*, [3 Md.App. 251, 238 A.2d 561 (1968)]. The sentencing judge may, but need not, obtain a presentence report under Article 41, § 124(b). Of course, the sentencing judge may take into consideration the defendant's conduct after the offense was committed, viz., he may consider evidence of events occurring after the date of the original sentencing to whatever extent he may deem necessary. *North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969); *Williams v. New York*, 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1337 (1949); *Purnell v. State*, [241 Md. 582, 217 A.2d 298 (1966)]; *Gatewood v. State*, 15 Md.App. 450, 291 A.2d 688 (1972)." 267 Md. at 193-94, 297 A.2d at 706.

More recently in *Logan v. State*, 289 Md. 460, 425 A.2d 632 (1981), Judge Digges said for the Court:

> "In considering what is proper punishment, it is now well-settled in this State that a judge is not limited to reviewing past conduct whose occurrence has been judicially established, but may view 'reliable evidence of conduct which may be opprobrious although not criminal, as well as details and circumstances of criminal conduct for which the person has not been tried.' *Henry v. State*, 273 Md. 131, 147-48, 328 A.2d 293, 303 (1974)." 289 Md. at 481, 425 A.2d at 643.

We are not concerned here with crimes, as in *Scott v. State*, 297 Md. 235, 465 A.2d 1126 (1983), with which an accused was charged but had not yet been convicted. We believe that under our prior cases this institutional history was properly admissible.

b. Huffington's statement

It is customary in a presentence investigation for the defendant's version of the relevant facts to be set forth. The events leading to the death of the victims apparently occurred in the early morning hours of May 25, 1981. Huffington has summarized in his brief the relevant evidence adduced at trial. That pertaining to the critical time is:

> "At 2:00 a.m., Appellant, Kanaras, Hudson and Becker all left the nightclub and drove to the trailer. Once inside the trailer, Appellant paid Hudson $ 275.00 for three and one-half grams of cocaine. At that point, all concerned had ingested various quantities of cocaine and marijuana.
>
> "After completing the transaction, Appellant and Kanaras returned to Appellant's apartment and ingested more cocaine. Appellant then began making telephone calls in an effort to find a buyer for additional cocaine retained by Hudson. Appellant ostensibly found a buyer, and had Kanaras drive him back to Hudson's trailer. Arriving between 3:30 and 4:00 a.m., they picked up Hudson and drove him to the rural Wheel Road area of Harford County. According to Kanaras, after the three men exited the car Appellant shot and killed Hudson and removed a quantity of cocaine from the latter's pocket.
>
> "Appellant then turned the gun on Kanaras, forcing him to drive back to the Hudson trailer for the purpose of stealing money. Once inside the trailer, Appellant killed Diane Becker by striking her on the head with a vodka bottle and then stabbing her some 33 times with a knife. Under duress, Kanaras then helped Appellant steal a large amount of cash and Becker's purse, which contained narcotics and paraphernalia.
>
> "Kanaras' testimony continued that for the next several hours he remained with Appellant, helping

him to dispose of evidence and to establish an alibi by attending a local 'fiddler's convention.' Kanaras remained with Appellant and refrained from informing anyone of the killings even after the disposal of the gun and knife used in the homicides because he remained 'scared' of Appellant."

The version obtained by the Parole and Probation agent as set forth in the presentence investigation report was as follows for the critical period:

"About 1:45 a.m. the defendant and Kanaras left the Golden 40 and followed Hudson's car to an Edgewood 7-11 Store and then to Hudson's Motorhome. Diane Becker walked over to their car and asked them to wait until the people in the other car left. After the other vehicle left, the defendant and Kanaras entered the motorhome and all four (4) sat down. Hudson and the defendant discussed a future cocaine deal and Kanaras bought some cocaine from Hudson, after which Huffington and Kanaras left. They drove back to Huffington's apartment and both went inside. Kanaras allegedly wanted to party, but the defendant said he was tired and wanted to go to bed. Kanaras then left and the defendant went to sleep.

"On 5/25/81 at about 9 a.m., Kanaras returned to Huffington's apartment and asked him to go partying. After showering, the defendant and Kanaras did some cocaine and drove around, heading toward the Fiddler's convention in Cecil County . . . .

"About 6:30 p.m. Kanaras called him asking him to cover for him, to tell anyone who asked, that they were at the Fiddler's Convention all night. The defendant claimed that at that time he did not know why Kanaras asked him to cover for him . . . .

> "The defendant stated that he protected Kanaras with an alibi. He claimed that Kanaras never explained why he needed an alibi. The defendant denied participation in the crimes and denied his guilt to the charges. When asked if he had knowledge of or a hunch who committed the offense, the defendant said, 'I couldn't say.' He stated that he feels 'fed up' and has 'lost a lot of respect for the judicial system.'"

Relying upon *Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981), Huffington claims that the admission of his statement violates his rights under the Fifth Amendment to the United States Constitution as delineated in *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). He makes no contention relative to Sixth Amendment rights. In *Estelle* the Court said, "We can discern no basis to distinguish between the guilt and penalty phases of respondent's capital murder trial so far as the protection of the Fifth Amendment privilege is concerned." 451 U.S. at 462-63, 101 S.Ct. at 1873, 60 L.Ed.2d at 369. The Court further said:

> "'Volunteered statements . . . are not barred by the Fifth Amendment,' but under *Miranda v. Arizona*, *supra*, we must conclude that, when faced while in custody with a court-ordered psychiatric inquiry, respondent's statements to Dr. Grigson were not 'given freely and voluntarily without any compelling influences' and, as such, could be used as the State did at the penalty phase only if respondent had been apprised of his rights and had knowingly decided to waive them. *Id.*, at 478. These safeguards of the Fifth Amendment privilege were not afforded respondent and, thus, his death sentence cannot stand.[13]

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[13] Of course, we do not hold that the same Fifth Amendment concerns are necessarily presented by all types of interviews and examinations that might be ordered or relied upon to

> inform a sentencing determination." 451 U.S. at 469,101 S.Ct. at 1876, 60 L.Ed.2d at 373.

We simply do not find *Estelle* or Huffington's Fifth Amendment rights applicable to the statement in the case at bar. We have set forth Huffington's version of the evidence and the statement in question at some length in order that there may be no misunderstandings. It is true that Huffington in his statement indicated that he had been in the company of Kanaras and of the victims, Diane Becker and Joseph Hudson. However, according to the statement given by Huffington, at the time when the alleged crimes were being committed he was home by himself and asleep. We find no infringement of Huffington's rights against self-incrimination.

iv. Victim participation

Code (1957, 1982 Repl.Vol.) Art. 27, § 413(g)(2) provides that a mitigating factor shall be that "[t]he victim was a participant in the defendant's conduct or consented to the act which caused the victim's death." Huffington contends that Hudson was a participant in the conduct leading to his death and hence Huffington was entitled as a matter of law to this mitigating factor.

Art. 27, § 413(g), enacted by Ch. 3 of the Acts of 1978, is modeled after § 210.6(4)(c) of the Model Penal Code. The latter states relevant to mitigating factors, "The victim was a participant in the defendant's homicidal conduct or consented to the homicidal act." There are no relevant cases, annotations, or legislative references concerning either section which we have been able to find. Accordingly, the commentary note to the Model Code provision is of importance. II *Model Penal Code and Commentaries*, § 210.6 (1980) states:

> "Paragraph (c) addresses the case where the victim is partially responsible for his own death. This circumstance obtains chiefly in two kinds of situations. First, there are occasions in which the defendant and his victim are engaged jointly in an

activity highly dangerous to each. If each person's participation depends upon the cooperation of the other, a murder conviction may lie for the death of one actor, even though both share responsibility. An example may be the case of Russian roulette, at least where the defendant actually fires the shot that kills his partner. A second situation within the scope of Paragraph (c) is the true mercy killing. There the defendant's homicidal act may not have occurred had the victim not consented to it. In either of these contexts, the conduct of the victim in bringing about his own death deserves consideration as a mitigating factor in assigning a death sentence." *Id.* at 140-41.

Huffington contends:

"Hudson's activity falls within the first situation. Accompanying known drug dealers to a rural area in the middle of the night has much in common with 'Russian roulette'—the chance of becoming a victim of crime in that circumstance is probably better than one in six. Hudson's activity was illegal, foreseeably dangerous, and very much a part of *Appellant's* conduct. Absent the victim's participation in this illegal and dangerous activity, there would have been no murder. The mitigating factor should have been returned and considered." (Emphasis in original.)

Kanaras testified as to Hudson's death:

"Ah, I parked the car, and where the car was parked it wasn't too much room on each side of the road, it was like a slight embankment on one side and an embankment on the other side, so two people really couldn't fit together coming out of the car, so I got out of the driver's side of the car and Joe Hudson got out of the passenger side of the car, and we met at the—the back of the car, and John Huffington was right behind too, about three or four steps, and as we

> walked up to the house, that's when I heard these shots—four or five shots rang out, and I saw Joe Hudson fall—fall to the ground to his—on his side, and he rolled—he rolled over . . . ."

This was the evidence before the jury. It does not make Hudson out as a participant in Huffington's conduct which caused Hudson's death. According to the testimony Hudson and Huffington were joint participants and co-conspirators in an alleged drug sale. The conduct which caused Hudson's death related to Huffington's carrying and concealing a loaded pistol and the firing of such pistol at Hudson's back. It is beyond the stretch of anyone's imagination to say that Hudson participated in this conduct.

We have recently stated, "It is the accused's burden to prove, by a preponderance of the evidence, the existence of a mitigating circumstance. [Section] 413(g); *Tichnell v. State*, 287 Md. 695, 730, 415 A.2d 830, 848-49 (1980)." *Stebbing v. State*, 299 Md. 331, 361, 473 A.2d 903, 918 (1984). In the case at bar Huffington failed to carry his burden concerning proof of the mitigating factor that Hudson participated in the acts causing his death. Moreover, the issue was not presented to the trial court. Hence, it is deemed waived. Rule 885.

v. Arbitrariness in seeking the death penalty

At one point in the proceedings Huffington proffered a guilty plea in exchange for a life sentence. Huffington asserts that defense counsel was "under the impression that the State had conditionally accepted the offer," but then rejected it when the parents of Becker found it unacceptable. Huffington moved to strike the notice of intention to seek the death penalty, contending consideration of the wishes of the family made this an arbitrary factor. He relies upon *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), and *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).

The State responds that it "had already made [the] decision [to seek the death penalty], given notice to

[Huffington], and proceeded to trial prior to the alleged 'arbitrary' action." It contends that the feelings of victims' families are legitimate considerations and that in any case it is not bound to accept a proposed plea agreement. It further asserts:

> "In this case the Court at sentencing invoked a novel procedure when it allowed the defense to place plea negotiations before the sentencing jury and argue that the State's consideration thereof should be a mitigating factor. In other words, the jury was allowed to determine whether the State's response to the defense's offer was some indication that the death penalty was not appropriate in this case. The State protested such action below and it is the State's position here on appeal that this procedure gave Appellant more than he was entitled to."

In *Calhoun v. State*, 297 Md. 563, 468 A.2d 45 (1983), the accused mounted an attack upon our death sentence statute based upon what he called the prosecutor's "unbridled exercise of discretion" under Art. 27, § 412(b). We considered *Gregg* and *Furman* and concluded:

> "Absent any specific evidence of indiscretion by prosecutors resulting in an irrational, inconsistent, or discriminatory application of the death penalty statute, Calhoun's claim cannot stand. To the extent that there is a difference in the practice of the various State's attorneys around the State, our proportionality review would be intended to assure that the death penalty is not imposed in a disproportionate manner." 297 Md. at 605, 468 A.2d at 64.

We do not regard consultation with the family of the victim here, after the State had already made a decision to seek the death penalty and after trial had begun, as any

evidence of indiscretion by a prosecutor. We hold this contention to be without merit.

vi. The indictment

At Huffington's first trial a special verdict form was used. The jury convicted him of two felony murders and specifically acquitted him on charges that the two murders were premeditated. *Huffington v. State*, 302 Md. 184, 186, 486 A.2d 200, 201 (1985). The conviction was reversed on appeal. As Huffington puts it, "The State elected to try the second case on the same indictment, which appears to have been modified to reflect the exclusion of premeditated murder from the case." The charge of murder of Hudson reads as follows:

> "The Jurors of the State of Maryland, for the body of Harford County, do on their oath present that JOHN NORMAN HUFFINGTON, late of said County, on or about the 25th day of May, 1981, in the County aforesaid, unlawfully, willfully and of deliberately premediated [sic] malice aforethought did kill and murder Joseph Mallison Hudson, Jr., contrary to the form of the Act of Assembly in such case made and provided, and against the peace, government and dignity of the State." "(Murder, First Degree, Art. 27, §§ ~~407~~, 410, ~~412~~, ~~413~~, ~~616~~ )".

Except for not striking out the inapplicable sections of the Code, the count in the indictment pertaining to the death of Diane Becker is identical, including the misspelling of "premeditated."

Huffington challenges his indictment on the ground that "[t]he charging documents . . . listed the elements for premeditated murder, but not felony-murder." He objects on jurisdictional grounds and constitutional grounds. In the trial court no pretrial motion was made pertaining to the adequacy of the indictment. There was a motion to dismiss on double jeopardy grounds, an issue which we considered and rejected in *Huffington v. State*, 302 Md. 184, 486 A.2d 200 (1985).

In *Williams v. State*, 302 Md. 787, 490 A.2d 1277 (1985), Chief Judge Murphy recently said for the Court:

> "Under Maryland Rule 4-252(a) (formerly Rule 736a), a motion alleging a 'defect' in the charging document 'other than its failure to show jurisdiction in the court or its failure to charge an offense' must be filed within a designated time period prior to trial or the defect is waived.[2] The rule provides in subsection (c) that a motion 'asserting failure of the charging document to show jurisdiction in the court or to charge an offense may be raised and determined at any time.' A claim that a charging document fails to charge or characterize an offense is jurisdictional and may be raised, as here, for the first time on appeal. *See Putnam* [*v. State*, 234 Md. 537, 200 A.2d 59 (1964)]; *Baker* [*v. State*, 6 Md.App. 148, 250 A.2d 677 (1969)]; Maryland Rule 885. Where the claimed defect is not jurisdictional, it must be seasonably raised before the trial court or it is waived.

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[2] "For good cause shown, the rule permits the trial court to order otherwise." 302 Md. at 792, 490 A.2d at 1279-80.

To like effect see *Hall v. State*, 302 Md. 806, 809, 490 A.2d 1287, 1288 (1985). It follows, therefore, that any constitutional claim is waived because there was not a motion filed within the time limited by the rule.

The indictment was in the statutory form. Judge Cole recently said for the Court in *Robinson v. State*, 298 Md. 193, 202, 468 A.2d 328, 333 (1983), "[A]t least as a matter of state non-constitutional law, the legislatively enacted short-form indictment is presumed to be sufficient to charge the offense named in the statute," referring to felony-murder. Hence, Huffington cannot prevail on this issue.

### vii. The constitutional issues

Huffington recognizes, as indeed he must, that we have heretofore found the Maryland Capital Punishment Statute to be consistent with the requirements of the Constitution of the United States. However, he draws upon the dissent by Justice Marshall, joined by Justice Brennan, to the denial of certiorari by the Supreme Court in *Stebbing v. Maryland*, __U.S.__, 105 S.Ct. 276, 83 L.Ed.2d 212 (1984), and suggests that "serious flaws exist in Maryland's statutory scheme." He asserts that "in at least two respects—manditoriness and a defendant's burdens—the Maryland procedure is substantially different from procedures found constitutional by the Supreme Court." Hence, he "urges reconsideration of these issues under Amendments Eight and Fourteen of the United States Constitution and Article 25 of the Maryland Declaration of Rights."

Cases in which we have considered and rejected constitutional attacks similar to that here raised include *Foster v. State*, 304 Md. 439, 471, 499 A.2d 1236, 1252 (1985); *Evans*, 304 Md. at 536, 499 A.2d at 1286; *Colvin v. State*, 299 Md. 88, 122-27, 472 A.2d 953, 970-72 (1984); *Calhoun v. State*, 297 Md. 563, 635-38, 468 A.2d 45, 80-81 (1983), and *Tichnell*, 287 Md. at 720-34, 415 A.2d at 843-50. We deem the matter to be settled.

### viii. Multiple murders

Huffington contends that the State improperly used the death of more than one person as an aggravating factor while at the same time seeking two death sentences.

Code (1957, 1982 Repl.Vol.) Art. 27, § 413(d)(9) lists that "[t]he defendant committed more than one offense of murder in the first degree arising out of the same incident" as an aggravating circumstance which may be considered by the sentencing authority. Separate findings and sentencing determination forms were submitted to the jury pertaining to the death of each of the victims. In each instance the jury

found that the defendant committed more than one offense of murder in the first degree arising out of the same incident. In each instance the jury also found as an aggravating factor that Huffington committed the murder while committing or attempting to commit robbery, arson, or rape or sexual offense in the first degree, a factor spelled out in Art. 27, § 413(d)(10).

Huffington argues:

> "Obviously, the legislature intended that only one death sentence be returned in a case where more than one person was killed: Imposition of a second death sentence is redundant, and is inconsistent with the purpose of making the additional murder(s) an aggravating factor. Such double punishment is improper."

In the recent case of *Thomas v. State*, 301 Md. 294, 483 A.2d 6 (1984), the defendant was convicted of murdering a husband and wife in the same incident. The State sought two death sentences. The trial judge, as the sentencing authority, found with respect to both homicides the aggravating factor authorized by § 413(d)(9), namely that Thomas committed more than one offense of murder in the first degree arising out of the same incident. We said, "We find no error in the trial court's application of § 413." *Thomas* is dispositive of this contention.

ix. Proportionality review

Code (1957, 1982 Repl.Vol.) Art. 27, § 414(e) provides:

> "(e) *Considerations by Court of Appeals.*—In addition to the consideration of any errors properly before the Court on appeal, the Court of Appeals shall consider the imposition of the death sentence. With regard to the sentence, the Court shall determine:
>
> "(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor;

"(2) Whether the evidence supports the jury's or court's finding of a statutory aggravating circumstance under § 413 (d);

"(3) Whether the evidence supports the jury's or court's finding that the aggravating circumstances are not outweighed by mitigating circumstances; and

"(4) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."

We do not find the death sentence here to have been imposed under the influence of passion, prejudice or any other arbitrary factor. We find that the evidence supports the jury's finding of statutory aggravating circumstances under § 413(d). We further find that the evidence supports the jury's finding that the aggravating circumstances are not outweighed by mitigating circumstances.

We turn to the proportionality review to determine whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

In *Thomas v. State*, 301 Md. 294, 483 A.2d 6 (1984), Chief Judge Murphy said for the Court:

"The principles governing proportionality review of a death sentence in Maryland have been stated in a number of our cases. *Stebbing v. State*, 299 Md. 331, 473 A.2d 903 (1984); *Colvin v. State*, 299 Md. 88, 472 A.2d 953 (1984); *Calhoun v. State*, 297 Md. 563, 468 A.2d 45 (1983); *Tichnell v. State*, 297 Md. 432, 468 A.2d 1 (1983). The fundamental object of the statutorily mandated appellate review process is the avoidance of the arbitrary or capricious imposition of the death penalty by affording similar treatment to similar capital cases. *Tichnell*, 297

> Md. at 466, 468 A.2d 1. The focus of § 414(e)(4) is upon capital cases in which the sentencing authority determined to impose a life or death sentence; the subsection aims to assure that upon consideration of both the crime and the defendant the aggravating and mitigating circumstances present in one capital case will lead to a result similar to that reached under similar circumstances in another capital case, thus identifying the aberrant sentence and avoiding its ultimate imposition. *Id.* 297 Md. at 465, 468 A.2d 1. Our procedure is to review all reports filed by trial judges in capital sentencing cases, as required by Maryland Rule 772A, and to select those which we deem 'similar' within the contemplation of the statute." 301 Md. at 334-35, 483 A.2d at 27.

Huffington is now 23 years of age and was about two and a half months short of 19 years of age at the time of the incident in question. As we have indicated, in each of the two homicides the jury found the aggravating factors that the defendant committed more than one offense of murder in the first degree arising out of the same incident and that he committed each murder while committing or attempting to commit robbery, arson, or rape or sexual offense in the first degree. Mitigating circumstances found by a preponderance of the evidence were the youthful age of the defendant at the time of the crime and that he had not previously been found guilty of a crime of violence, entered a plea of guilty or nolo contendere to a charge of a crime of violence, or had a judgment of probation on stay of entry of judgment entered on a charge of a crime of violence.

The evidence shows that Huffington murdered Joe Hudson by shooting him five times in the back and head and that he then stole drugs from Hudson's person. It further shows that Huffington then went to Hudson's mobile home and there murdered Diane Becker by striking her with a bottle

and then stabbing her thirty-three times. He took money and drugs from the home before fleeing.

In *Tichnell v. State*, 297 Md. 432, 469, 468 A.2d 1, 20 (1983), we set forth the "relevant universe" to be considered by us in our proportionality review. In the process of our review in this case we have considered each of the reports submitted by trial judges under Maryland Rule 4-343. We have selected eight which we deem to be "similar" within the contemplation of Art. 27, § 414(e)(4).

*Lawrence Johnson.* Johnson was 17 years and 10 months old at the time of the commission of his crimes. According to the report of the trial judge he and his cousin entered a dwelling house through a basement window. Once inside they went up the basement steps to the first floor where they discovered the presence of the victim, who was 78 years old, small in stature, weighed but ninety pounds and was home alone. When their demands for money were not satisfied they grabbed her and shoved her into a spare bedroom. In the course of this episode the victim was brutally beaten with a broom handle, stomped on and kicked, tied, and strangled to death.

The jury found as an aggravating circumstance that the murder was committed while committing or attempting to commit robbery, arson or rape or sexual offense in the first degree. Mitigating circumstances found were that the defendant was not the sole proximate cause of the victim's death and, under "[o]ther mitigating circumstances," the life sentence of the co-defendant. The jury sentenced to death.

*Donald Thomas.* Thomas was 23 years old when he committed the acts which brought him to the bar of justice. The trial judge in his report summarized the facts:

> "Somehow on the night of October 1-2, 1981, the Defendant and the deceased, Donald Spurling, were in joint company with each other. This association appeared friendly. After visiting at least one person, and a bar, they subsequently ended up at the

> Spurling residence in Baltimore County. For some motivation unbeknownst to the Court, the Defendant killed, with multiple stab wounds, Donald Spurling. Mrs. Spurling, who was apparently awakened by some noise, was subsequently stabbed to death by multiple wounds by the Defendant and sexually molested by the Defendant either during or after her life [sic]. The Defendant then went to the second floor and raped a young woman in her bed, who was a boarder of the Spurling residence. She ultimately escaped by jumping out of the second story window."

The trial judge found as the sole aggravating circumstance that Thomas had committed more than one murder. No statutory mitigating circumstances were found to exist. The judge did find under "[o]ther mitigating circumstances" "demographic characteristics and background of defendant." The trial judge, as the sentencing authority, concluded that the aggravating circumstances outweighed the mitigating circumstances and imposed the death penalty.

*Willie Green.* Green was 40 years of age when he and an accomplice murdered two employees of a restaurant in the course of a robbery. The victims were both stabbed to death. One victim had his hands tied behind him and his throat was slit. Two aggravating circumstances were found to exist, that Green committed more than one murder in the first degree arising out of the same incident and that the murders were committed during the commission of a robbery. Mitigating circumstances found were that the defendant was not the sole proximate cause of the deaths of the victims and that it was unlikely in view of his age that he would engage in further criminal activity. The trial judge was the sentencing authority. He found by a preponderance of the evidence that the mitigating factors outweighed the aggravating factors. Accordingly, life sentences were imposed.

*Eugene Sherman Colvin.* Colvin broke into a house. In the course of the crime he encountered the victim who was

visiting in the home of her daughter. The victim was stabbed twenty-eight times about the throat. The weapon used was an eight-inch serrated knife taken from the kitchen of the home. About $ 10,000 in jewelry was removed from the residence. The victim's money was taken. Colvin was found guilty of premeditated murder, felony murder, robbery with a deadly weapon, and housebreaking.

As an aggravating circumstance the jury found that the murder was committed while committing or attempting to commit robbery, arson, or rape or sexual offense in the first degree. No mitigating circumstances were found. Colvin had been convicted several times of burglary, assault, and larceny. The jury imposed the death sentence.

*James Arthur Calhoun.* Calhoun was 28 years of age when he became involved in an incident leading to hisconviction of premeditated first degree murder of a Montgomery County police officer who had responded to a security alarm at a mercantile establishment. The officer, in company with the assistant manager of the store and a representative of the burglar alarm system for the store, entered a room inside the store where Calhoun and an accomplice had concealed themselves. Calhoun pressed a gun against the officer's head and shot him to death. Calhoun's accomplice, Curtis Monroe, shot and killed the alarm system representative and wounded the assistant manager. Calhoun and Monroe took money from the store and fled. The jury found as aggravating factors: (1) The victim was a law enforcement officer who was murdered in the performance of his duties; (2) the defendant committed the murder in furtherance of an escape or an attempt to escape from or evade the lawful custody, arrest or detention of or by an officer or guard of a correctional institution or by a law enforcement officer, and (3) the defendant committed the murder while committing or attempting to commit robbery. The only mitigating circumstance found was set forth under "[o]ther mitigating circumstances." The jury stated:

> "This jury feels that a substantial mitigating factor is the defendant's background, which has been such that he has never been integrated into society. Therefore, he has been and is unable to conform with its norms and moral values."

The jury imposed a death sentence.

*Curtis Wayne Monroe.* Monroe is the same Monroe mentioned relative to James Arthur Calhoun. The incident is also the same. The report of the trial judge relative to the facts, states:

> "The police officer was pulled into a room, subdued, and shot in the head by Calhoun. At the same time, Monroe began firing a handgun, wounding the assistant manager, Douglas Cummins, and firing two shots into the alarm technician, David Myers, resulting in the death of Mr. Myers."

Monroe waived a jury and elected to have the sentencing procedure before the trial judge. As an aggravating circumstance it was found beyond a reasonable doubt that Monroe "committed the murder while committing or attempting to commit robbery, arson or rape or sexual offense in the first degree." The trial judge noted two mitigating circumstances. First, he found that it was unlikely the defendant would engage in further criminal activity that would constitute a continuing threat to society. Second, under "[o]ther mitigating circumstances," he found:

> "Defendant has been employed, has a wife and two children.
>
> "The actions of the defendant causing the murder, along with his background when compared to the other first degree murder cases occurring since the enactment of Article 27, Section 413, in which the death penalty has not been imposed.

> "Efforts by the defendant since his incarceration to further his education."

Life imprisonment was imposed. In his report to us the trial judge said:

> "The primary consideration in not imposing the death penalty was the Court's own proportionality test in comparison to other offenses in the Circuit Court for Montgomery County in which the death penalty had been sought but not imposed, and a comparison between Curtis Wayne Monroe and the co-defendant James Arthur Calhoun, who received the death penalty, indicated that the imposition of the death penalty was not appropriate in this case. Other mitigating circumstances did not outweigh the aggravating factor and the nature of the offense."

*Jackie Hughes.* While a manager of a restaurant was walking to a nearby bank to deposit weekend receipts, Hughes approached him from behind, grabbed him, spun him around, and shot him in the stomach. After a brief struggle Hughes wrested away the deposit. The victim, who was licensed to carry a handgun, fired several shots at Hughes at close range. A jury found Hughes guilty of first degree murder on the basis of the fact that it was a deliberate, willful and premeditated murder as well as a felony murder.

The jury found as an aggravating factor that the murder was committed while committing or attempting to commit a robbery. As a mitigating factor it found that Hughes had not previously been convicted of a crime of violence, etc. It also checked on the sentencing form that other mitigating circumstances existed. However, it listed no such circumstances. The jury returned a sentence of life imprisonment.

*Brian Keith Quickley.* Quickley and two others entered a furniture store in Harford County. An accomplice lured the victim to an area of the store isolated from the cash register.

Quickley there shot the victim once between the eyes and again, as he was falling, in the back of the neck. The three individuals then left the store, taking television sets with them.

The jury found one aggravating circumstance, that the defendant committed the murder while committing or attempting to commit a robbery. It found two mitigating circumstances. The first was the youthful age of the defendant at the time of the crime. The second, under "[o]ther mitigating circumstances," was:

> "The defendant is at the borderline range of intelligence with severe intellectual limitations both at the verbal and performance measured levels. His overall Intelligence Quotient was scored at 71. He is the product of an impoverished, social and educational environment. His academic progress has been limited. He has been in and out of Special Education and last attended the ninth grade. Extensive materials (tests, reports, etc.) from Juvenile Services, Harford County Public School System, the Maryland Children's Center and various social service groups have been filed in these proceedings as exhibits that demonstrate these inabilities."

The jury sentenced him to life imprisonment.

We find the sentences not disproportionate to those imposed in similar cases. It thus follows that the death sentences must be affirmed.

JUDGMENT AFFIRMED.

**IN THE**
**COURT OF APPEALS OF MARYLAND**

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Nos. 64 and 133

September Term, 1984

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JOHN NORMAN HUFFINGTON

v.

STATE OF MARYLAND

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Murphy, C.J.
Smith
Eldridge
Cole
Rodowsky
Couch
McAuliffe,

JJ.

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Dissenting Opinion by McAuliffe, in which Eldridge and Cole, JJ. concur.

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Filed: November 13, 1985

I cannot agree that the trial judge properly excluded a transcript of the testimony of Stephen Rassa. Rassa's testimony was critical to Huffington's defense, and Rassa could not be found. Huffington therefore offered a transcript of testimony given by Rassa as a State's witness in the prosecution of Deno Kanaras, but this evidence was rejected on the ground the State had no opportunity to cross-examine its own witness. The majority recognizes that direct-

examination by the party against whom the testimony is offered may be sufficient to justify the admission of previous testimony, but affirms on the basis that the motives of the State at the time it offered the evidence differed significantly from those of Huffington when he offered it. A careful analysis of the facts will disclose, however, that Huffington and the State each wanted to develop precisely the same facts from Rassa, and that each did so for the purposes of impeaching Kanaras' credibility and discrediting his claim of duress. That the State's motive in the first case was to convict Kanaras by discrediting his testimony and its motive in the second case was to convict Huffington by relying on Kanaras' testimony is simply irrelevant. It is the identity of the motives of the two parties who offer the testimony that is material, and not the shifting motives of the State.

The general rule applicable in this situation is not in dispute. Professor Wigmore wrote:

> [T]he whole notion of cross-examination refers to one's right to probe the statements of an opponent's witness, not one's own witness; thus, if A has taken X's deposition or called X to the stand, and B has cross-examined, it is not for A to object that he has not had the benefit of cross-examination; that benefit was not intended for him nor needed by him; it was intended only to protect against an opponent's witness, who would be otherwise unexamined by A; and if A has had the benefit of examining a witness called on his own behalf, he has had all that he needs, and the right to probe by cross-examination is B's, not A's.
>
> 5 Wigmore, *Evidence* § 1389 at 105 (3d ed. 1940).

And in a more recent text the authors pose and answer the question in this fashion:

> Is the opportunity for direct and redirect examination the equivalent of the opportunity for cross-examination? If party A (or his predecessor

> in interest) calls and examines a witness in the first hearing, and this testimony is offered against A in a second trial, may it come in against the objection of want of opportunity to cross-examine? The decisions sensibly hold that it may.
>
> *McCormick on Evidence* § 255 at 762 (E. Cleary 3d ed. 1984).

Fed.R.Evid. 804(b)(1) is to the same effect, and describes the circumstances under which the former testimony of an unavailable witness will not be excluded by operation of the hearsay rule:

> Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

The pivotal question, then, is whether the State had a motive similar to that of Huffington to develop the testimony of Rassa. This in turn requires a consideration of the issues intended to be addressed by the testimony in each case, and as indicated by the following advisory committee note to Fed.R.Evid. 804(b)(1) the question is whether there exists a "substantial" identity of issues.

> The common law did not limit the admissibility of former testimony to that given in an earlier trial of the same case, although it did require identity of issues as a means of insuring that the former handling of the witness was the equivalent of what would not be done if the opportunity were presented. Modern decisions reduce the requirement to "substantial" identity. Since identity of issues is significant only in that it bears on

> motive and interest in developing fully the testimony of the witness, expressing the matter in the latter terms is preferable. (Citation omitted).

We look first at Huffington's motive in seeking to introduce the testimony of Rassa. It was clear from the State's evidence that only two persons in addition to the victim were present on the occasion of each murder—Kanaras and Huffington. Kanaras was therefore the State's principal witness against Huffington. Kanaras testified that he was with Huffington on the night of the murders, but that Huffington killed each victim. Kanaras denied any previous knowledge that Joseph Hudson or Diane Becker were going to be robbed or murdered, and he further asserted that while he had been forced by Huffington at gunpoint to provide some assistance he did not assist in any way in the actual killing of the victims.

Kanaras testified he had known Hudson and Huffington for some time, and had purchased drugs from both of them. On the night in question he and Huffington were attempting to purchase cocaine when they met Hudson and Becker (Hudson's girlfriend) at a bar. Arrangements were made to buy the drug from Hudson, and Kanaras drove Huffington to the trailer shared by Hudson and Becker. Kanaras said Hudson sold them 3.5 grams, which appeared to be about half the supply Hudson had on hand. He said he and Huffington then returned to Huffington's apartment where they used some cocaine and Huffington apparently made calls in an attempt to broker the sale of Hudson's remaining cocaine. Acting on the belief that Huffington had found a buyer, and upon the promise that Huffington would give him some additional cocaine for providing transportation, Kanaras said he drove Huffington back to the Hudson trailer, where Hudson joined them. He then drove, at the direction of Huffington, to a rural area in Harford County and stopped near a farmhouse. According to Kanaras, he was walking alongside Hudson toward the farmhouse to meet the prospective purchaser when Huffington fired five shots into

Hudson. Kanaras said that Huffington then reloaded the pistol, rolled the body of Hudson over, and fired two more shots into Hudson's head at point-blank range. Kanaras admitted that the weapon used had once been owned by him, but claimed he had sold it to Huffington about five weeks earlier.

Kanaras said Huffington then pointed the gun at him and ordered him to drive back to the trailer. Once inside the trailer Kanaras was directed to search for Hudson's money. Following a successful search, Kanaras said Huffington struck the sleeping Diane Becker several times with a heavy bottle, and then repeatedly stabbed her with a knife Huffington produced from his boot. Kanaras testified he was then forced to accept a large amount of the money that had been stolen from Hudson, and to assist Huffington in destroying or disposing of evidence and attempting to establish an alibi. Kanaras denied he had been to Hudson's trailer during the week preceding the murders, and denied having possessed a gun at that time.

Rassa's testimony dealt with the events of May 20, 1981, five days before the murders. Rassa testified he and Kanaras had driven to Hudson's trailer on that date, to buy cocaine. In response to direct questions by the State's Attorney, Rassa described the events immediately preceding entry into Hudson's trailer:

> A. Well, there had been a lot of discussion on the way down Long Bar Harbor Road between Deno and myself, and Deno had told me he was interested in going to Joe's trailer—Joe Hudson—to buy some cocaine.
>
> * * * * * *
>
> Deno became very quiet. He wasn't holding any conversation with me. Because I had had prior conversations with him about Joe Hudson and Diane Becker. I was nervous and I wasn't sure what was going to happen down that road and I

wanted a chance to kind of find out what he was thinking about so that I might be able to talk him out of it. . . .

* * * * * *

Q. [By State's Attorney] . . . As a result of certain conversations you had with Deno in the car right before you got to Hudson's trailer on the 20th, tell us—right before you went into the trailer, tell us what you said to him and what he said to you?

A. Okay. As he was pulling his car to a stop outside of the motor home—excuse me—I want to be absolutely sure. I can remember that as the car was coming to a stop he turned towards me and he reached underneath of my seat, and I said, "What are you doing", and he said, "I'm getting my gun." And I said, "Leave it there. Don't get your gun. I don't want any parts of anything like this." And I looked both ways outside of the car because I didn't want to be seen. I wasn't really sure what was going to happen at that time. . . .

* * * * * *

I said, "Come on, Deno, let's go in.", and he said, he reached under the seat again, and I said again, "What are you doing?", and he said, "I'm just getting my gun. I just want to show it to you," And I said, "Deno, I don't need to see your gun. I've seen it before. Just leave it there." At that time I said to Deno "Is there something you're not telling me? Do you owe Joe money?" And there was no reply. I looked at him and I said, "Do you actually think that you could actually rob and shoot somebody in the middle of a crowded trailer park like this in daylight, and do you actually think you could shoot someone?" And there was no reply. Deno then—excuse me—I said to Deno—no, excuse me again—Deno said, "I have a knife in the

> glove compartment." And I said, "Are you crazy? Do you actually think you could stab someone with a knife?" He said, "No, but you could", referring to myself. And I told him "I didn't want any parts of any of this."

On cross-examination Rassa said that on several occasions prior to May 20th he and Kanaras had discussed the possibility of robbing Hudson, and that he, rather than Kanaras, had initiated further discussion of the subject on that day.

Huffington's motive in offering this testimony is clear. Rassa directly contradicted Kanaras' testimony that he had not been to the Hudson trailer on May 20th, that he had not had a gun on that date, and that he had not discussed robbing Hudson at that time. Furthermore, if the jury believed that Kanaras was contemplating a robbery of Hudson just five days before the robbery and murders occurred, and was discussing with Rassa the possible use of the very types of weapons actually thereafter used, the jury would most likely refuse to believe Kanaras' protestations of being an innocent pawn in the hands of Huffington. Rassa's evidence permitted a reasonable inference that Kanaras had been a principal actor in the robbery and murder, and such evidence may well have created a reasonable doubt in the minds of the jurors that Huffington was the actual killer.

Turning to the State's motive in offering the testimony of Rassa during the trial of Kanaras, it is apparent that it was substantially, if not precisely identical to Huffington's motive. Testimony given by Kanaras in his own behalf was the same as that later given by him against Huffington. *See Kanaras v. State*, 54 Md.App. 568, 570-72, 460 A.2d 61, *cert. denied*, 297 Md. 109 (1983). Kanaras' defense was that he did not knowingly aid or abet in the death of Hudson, and that any assistance rendered thereafter was under duress. Following Kanaras' testimony, the State offered the testimony of four rebuttal witnesses. The proffered testimony of these

witnesses was summarized by the Court of Special Appeals as follows:

> It was proffered that Stephen Rassa would testify that on May 20, 1981, shortly before purchasing cocaine from Hudson and Becker, Kanaras supposedly had to be dissuaded from robbing Hudson and stealing his cocaine. It was further proffered that Dale Saunders, Jr. would testify that Huffington and Kanaras came to "shake him down for money" due on a drug debt. Maryland State Trooper Gary Aschenbach, according to the State's proffer, would testify that while working undercover in early 1981, Kanaras had purchased drugs for him, had on one occasion carried a gun in anticipation of a large drug deal, and had expressed interest in an illegal scheme to destroy a boat for money. The testimony of Thomas Wagner, according to the State, would show that Kanaras had shown him what was to be the murder weapon. *Kanaras v. State*, *supra*, 54 Md.App. at 589.

Expressing some uncertainty that all the evidence proffered by the State was properly offered as rebuttal, the trial judge allowed the State to reopen its case, and thus Rassa's testimony became a part of the State's case in chief.

The majority states that "the purport of Rassa's testimony was that a few days before the incident in question Kanaras was still involved with drugs" and that this evidence was offered in rebuttal to Kanaras' earlier testimony that he had been free from drugs for some time before the murders. From this the majority concludes that the very limited objective of the State in offering this testimony differed substantially from the broader scope later intended by Huffington, and that the State therefore had no reasonable opportunity or motive to fully develop the facts about which Huffington was later concerned. The majority's conclusion is not supported by the facts. Kanaras had at all times readily admitted his involvement as a buyer and user of drugs. He

did deny, however, that he sold drugs. The Court of Special Appeals held that rebuttal evidence would be proper to show that Kanaras had been involved as a seller, but this clearly was not the principal thrust of Rassa's testimony.[1] A fair reading of the entirety of Rassa's testimony discloses an intent on the part of the State to discredit Kanaras' testimony, and show him to have been a principal. The Court of Special Appeals summed up the intent of the State when it said:

> [A]n important facet of the State's case was to prove that the appellant was a voluntary participant in the crimes. As such, it was proper to show that Kanaras both needed and lusted for money, had participated in prior drug transactions, and may have specifically considered robbing Hudson. The additional State's evidence supplied a motive for the crimes and supplied evidence of advance preparation for the crimes. As such, it was admissible to show an independent intent and motive to commit the crimes.
>
> *Kanaras v. State*, *supra*, 54 Md.App. at 589.

The importance of Rassa's testimony to assist the trier of fact in assessing the credibility of Kanaras is perhaps best illustrated by the argument of the State's Attorney in support of the State's motion to have Kanaras called as a court's witness.[2]

> The following reasons, I'm going to basically go through a skeleton sketch of what he would testify and and why we don't believe we can believe him. His first indication would be that the first time that he had heard this particular incident or that this

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[1] Rassa did not testify to any sale of drugs by Kanaras, but he did say that he and Kanaras had on occasion jointly attempted to sell methamphetamine.

[2] This motion was denied, and Kanaras was called as a State's witness.

> came about that he was aware that anybody was going to rob Joseph Hudson and Diane Becker was that night that it actually occurred – first of all, a witness tes—has testified, a State's witness has testified in a prior trial that Kanaras had discussed with him and tried to get him to rob Hudson sometime prior to this, and therefore we believe—it is the State's contention that we believe—what we believe is that Kanaras wanted to rob Hudson, didn't have the whatever to do it by himself, and continued looking for someone to help him with this robbery after that contact with that particular individual, and that he was successful in finding this other person in the person of the defendant before the Court. That's the State's theory of the case.

The previous sworn testimony of Rassa was necessary for the proper presentation of the defendant's case and substantial reasons existed to assume its reliability. The testimony was admissible under accepted rules of evidence in this State, and in any event admissible to afford the defendant due process of law. *Green v. Georgia*, 442 U.S. 95, 99 S.Ct. 2150, 60 L.Ed.2d 738 (1979); *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). I would reverse the conviction and remand for a new trial.

I am authorized to state that Judges ELDRIDGE and COLE concur in the views here expressed.

## APPENDIX I

## IN THE CIRCUIT COURT FOR FREDERICK COUNTY, MARYLAND

INDICTMENT NOS. 6374-6375

John Norman Huffington

Petitioner

vs.

STATE OF MARYLAND

* * * * * * * * * * * * * * * * * * * * * * * * * * * * * * *

OPINION AND ORDER OF COURT

Before the Court., pursuant to Article 27, Section 645A of the Annotated Code of Maryland and Maryland Rules 4-401 through 4-407, is a Petition for Post Conviction Relief filed on behalf of John Norman Huffington.

On June 16, 1981, the Petitioner was indicted with two counts of first degree murder, two counts of robbery with a deadly weapon, burglary and related offenses. On November 13, 1981, the Petitioner was convicted of two counts of felony murder, robbery, burglary, and violations of the handgun laws.

Subsequently a sentencing hearing was held in which the jury returned sentences of death for each of the felony murder convictions. On appeal, the Maryland Court of Appeals reversed Petitioner's conviction and sentence because of the trial court's prejudicial error in admitting certain evidence. *Huffington v. State*, 295 Md. 1, 452 A.2d 1211 (1982).

Petitioner was retried on October 31 through November 19, 1983 by the Circuit Court for Frederick County, The

Honorable William W. Wenner presiding, with a jury. The Petitioner was convicted of two counts of first degree murder, breaking and entering and handgun offenses, the remaining charges were resolved by acquittal or merger. A sentencing proceeding was conducted before the same jury on April 30 through May 1, 1984. Petitioner was sentenced to death for both murders and a total of eighteen years incarceration on the lesser charges.

The Maryland Court of Appeals affirmed Petitioner's convictions and sentences. *Huffington v State*, 304 Md. 559, 500 A.2d 272, *cert. denied*, 106 S.Ct. 3315 (1986).

In his Petition for Post conviction Relief the Petitioner makes 36 general allegations of error which he labels A-KK. Pursuant to Maryland Rule 4-407(a) the following is a list of the grounds stated for post conviction relief. The Petitioner claiming that:

A. The Jury was prosecution prone thus violating Petitioner's 5th, 6th and 14th Amendment rights.

B. The trial court failed to conduct an adequate voir dire thus denying Petitioner his 5th, 6th, 8th and 14th Amendment rights.

C. The State's Attorney failed to provide timely discovery of exculpatory statements thus denying Petitioner his 5th, 6th, 8th and 14th Amendment rights.

D. The State's Attorney failed to provide disclosure of exculpatory and or mitigating evidence thus violating Petitioner's 5th, 6th, 8th and 14th Amendment rights.

E. The trial court violated Petitioner's 5th, 6th, 8th and 14th Amendment rights by failing to grant his motion to disqualify the State's Attorney for Harford County.

F. His 5th, 6th, 8th and 14th Amendment rights were violated by the State's Attorney's improper comments during open statement at the trial on the merits.

G. He was denied his rights under the 5th, 8th and 14th Amendments by the improper introduction of inflamatory pictures into evidence.

H. He was denied his rights under the 5th, 8th and 14th Amendments by the introduction of testimony that the victim's 4 year old child was asleep in the same room as the victim at the time of the killing.

I. He was denied his 4th, 5th and 14th Amendment rights by the improper introduction of evidence seized beyond the scope of the search warrant.

J. He was denied his rights under the 5th, 6th, 8th and 14th Amendments by the improper introduction of the prior testimony of a State's witness, Kim Bognani.

K. He was denied his right to due process and compulsory process by the court's improper denial of the introduction of Stephen Rassa's prior exculpatory testimony.

L. He was denied his rights under the 5th, 8th and 14th Amendments by the improper introduction of evidence of his prior drug dealing.

M. His rights under the 5th, 8th and 14th Amendments were violated by the State's improper closing argument.

N. His 6th and 14th Amendment rights were denied by the protracted period between the remand of his case and the time of trial as he was denied his right to a speedy trial.

O. He was denied his rights under the 5th and 14th Amendments because the indictment failed to state all the necessary elements of the offenses charged.

P. He was denied his 5th, 8th and 14th Amendment rights in that the Court improperly denied his motion to strike notice of the State's intention to seek the death penalty.

Q. He was denied his rights by the improper use "of multiple murder aggravator" in seeking death penalty.

R. He was denied his rights by the improper use of the underlying felony, in a sentencing for a felony murder conviction, as an aggravating factor.

S. He was denied his rights under the 8th and 14th Amendments by the prosecutor's improper opening statement at sentencing.

T. He was denied his rights under the 5th, 8th and 14th Amendments by the State's submission to the sentencing jury of a reducted presentence investigation.

U. He was prejudiced by the submission, to the sentencing jury, of a presentence investigation which contained inadmissable evidence.

V. He was denied his rights under the 5th, 6th, 8th and 14th Amendments by the improper testimony of the State's Attorney at sentencing.

W. He was denied his 5th, 8th and 14th Amendment rights by the use of improper instructions at sentencing.

X. He was denied his rights by the court's failure to direct a verdict on the aggravating circumstances.

Y. He was denied his rights by the trial court's failure to direct findings, at sentencing, of mitigating circumstances.

Z. He was denied his 5th, 8th and 14th Amendment rights by the improper closing argument at sentencing by the State.

AA. He was denied his 8th and 14th Amendment rights in that it was improper to submit a sentencing form to the jurors.

BB. His 8th and 14th Amendment rights were violated in the death penalty as administered in Maryland is unconstitutional.

CC. His 8th and 14th Amendment rights were violated because his sentence was disproportionate.

DD. His 5th, 6th, 8th and 14th Amendment rights were violated because he received ineffective assistance of counsel.

EE. His rights were violated in that the State relied on the testimony of Deno Kanares, whose testimony the State believed to be false.

FF. His 8th Amendment rights and his due process rights were violated in that the decision to seek the death penalty was controlled by a constitutionally impermissible factor, the views of the victims' survivors.

GG. His Constitutional rights were violated by the introduction of a victim impact statement at sentencing.

HH. His Constitutional rights were violated by the State's Attorney's testimony on the availability of parole.

II. His Constitutional rights were violated at the guilt/innocence phase by the use of inadmissable hearsay statement of Danny Becker.

JJ. His Constitutional right to effective assistance of counsel was denied at sentencing because counsel was ineffective.

KK. Additional grounds and instances of ineffective assistance of counsel at the trial level.

In the State's "Memorandum in Answer to the Petitioner's Petition for Post Conviction Relief", the State concedes that, based on the Supreme Court decision in *Mills v. Maryland*, __U.S.__, 100 L.Ed.2d 384, 108 S. C. 1860 (1988), this Court will have to remand this case for a re-sentencing hearing. This Court, being bound by the *Mills* decision, will remand this case for a re-sentencing hearing and therefore need not address contentions: Q, R, S, T, U, V, W, X, Y, Z, AA, BB, CC, FF, GG, HH, and JJ as they are rendered moot by the State's concession.

In contentions A and B the Petitioner alleges that he was denied his Constitutional rights by the court conducting a "death qualifying" voir dire and by the court conducting an otherwise inadequate voir dire.

Article 27 § 643A (a) and (c) of the Annotated Code of Maryland states in part "Any person convicted of a crime . . . may institute a proceeding . . . to set aside or correct the sentence, provided the alleged error has not been . . . waived . . . ."

". . . For the purposes of this subtitle, an allegation of error shall be deemed to be waived when a Petitioner could have made, but intelligently and knowingly failed to make, such allegation, . . . on direct appeal . . . ." "[T]here shall be a rebuttable presumption that said Petitioner intelligently and knowingly failed to make such allegation."

These contentions, A and B, have been waived because they could have been raised on direct appeal.

Furthermore, in *Lockhart v. McCree*, __ U.S.__, 90 L.Ed.2d 137, 106 S.Ct. 1758 (1986), the Supreme Court, in an Opinion by Justice Rehnquist, held that the "death qualification" of a jury does not violate a defendants Sixth Amendment right that a jury must represent a fair cross section of the community. The Court also stated that "death

qualification" is designed to serve the State's legitimate interest in obtaining a single jury that can impartially apply the law to the facts of the case.

In considering the Petitioner's contention that the voir dire was inadequate, this Court agrees with the State and finds that not only was this issue waived on appeal but also that the voir dire was adequate.

Therefore contentions A and B are denied.

In contentions C & D the Petitioner alleges that the State's Attorney failed to provide timely discovery of exculpatory statements and that the State's Attorney failed to provide timely discovery of exculpatory statements and that the State's Attorney failed to provide disclosure of either exculpatory or mitigating evidence.

The Petitioner had or should have had in his possession a complete transcript of his co-defendant's trial in which Rassa testified. The defense called Rassa, as a witness. The Petitioner had hired an investigator to locate Rassa but was unsuccessful, therefore Rassa did not testify. Since the Petitioner has simply made a bold allegation unsupported by facts which would show that Rassa had exculpatory information which was not contained in the transcript of his prior testimony, this contention is denied.

The Petitioner contends that the State's Attorney failed to disclose that Deon Kanares had purchased hallucinogenic drugs shortly before these offenses occurred. The Petitioner argues that this failure prevented him from attacking Kanares' credibility. However the defense did have in its possession the transcripts of the Petitioner's first trial as well as transcripts from two trials wherein Kanares admitted to drug use before and on the evening of the crime. In the defendant's first trial he testified to Kanares' use of drugs the evening of the crime. Therefore the State did not fail to provide disclosure of any evidence which the defendant did not have access to. This contention is denied.

In the still viable portion of contention E the Petitioner claims that the trial court should have granted his motion to disqualify the State's Attorney for Harford County from appearing as counsel for the State at the trial.

This issue is deemed waived in that it was not raised on appeal. Furthermore, the Petitioner himself testified, at the motions hearing, that Mr. Cassilly did not offer a plea agreement to him. (Tr.22). Mr. Cassilly testified that he met with the Petitioner simply to assure that the Petitioner had been in contact with his lawyer because the Detention Center logs did not indicate any visits.

The Code of Professional Responsibility. DR 7-104(A) stated that an attorney shall not:

(1) "Communicate . . . on the subject of the representation with a party he knows to be represented . . ."

Mr. Cassilly did not discuss the *subject* for which the Petitioner was being represented but rather discussed whether in fact the Petitioner was being represented. This contention is denied.

In contention F the Petitioner claims that State's Attorney prejudiced him by making improper opening statements regarding the photographs which would later be entered into evidence. This contention is deemed waived in that it was not raised on appeal. Furthermore, the scope and latitude of an opening statement rests largely within the discretion of the trial court. *Boggs v. Boggs*, 138 Md. 422, 114 A 474 (1921). Since the remarks simply referred to evidence which he intended to introduce, the prosecutors opening argument is allowable under *Wilhelm v. State*, 272 Md. 404, 326 A.2d 707 (1974). This contention is denied.

In contention G the Petitioner claims that the actual introduction of the photographs was improper and inflammatory thereby causing him undue prejudice. This contention too is deemed waived in that it was not raised on

appeal. Furthermore, under *Fuller v. State*, 45 Md.App. 414, 413 A.2d 277 (1980), *Gray v. State*, 6 Md.App. 677, 253 A.2d 395 (1969) and *Fuget v. State*, 70 Md.App. 643, 522 A.2d 1371 (1987) it is left to the discretion of the trial judge to determine admissibility. Therefore, this contention is denied.

In contention I the Petitioner claims that the Court erred in allowing the introduction of evidence seized beyond the scope of the search warrant. The evidence in question was deemed admissable at the suppression hearing. Under the applicable Maryland Rules this issue is deemed waived in that it was not pursued on appeal. Therefore, it is denied.

In contention J the Petitioner alleges that it was improper for the trial court to permit the introduction of the prior testimony of Kim Bognani, a State's witness. The Petitioner claims that he was prejudiced because he was unable to cross examine the witness or develop further investigation because she was unavailable.

The State attempted at least four times to obtain the witness for this trial. (Tr.1676). However, the State was unsuccessful in obtaining her because, the State believed, she was in Italy. Furthermore, her testimony was not cumulative, as the defense suggests, because it goes to an alibi which Huffington was asserting .

The trial court did not improperly admit this testimony and this Court concurs in the trial court's reliance on *Contee v. State*, 229 Md. 486, 184 A.2d 823 (1962). Furthermore, this issue is waived in that it too was not raised on appeal. Therefore, this contention is denied.

In contention K the Petitioner claims that the trial court violated his Constitutional rights by excluding the transcript of Stephen Rassa's prior testimony, at the co-defendant's trial, despite Rassa's unavailability at Petitioner's trial.

Article 27 § 645A(a) and (b) state in part that a defendant may institute a proceeding ". . . providing the alleged error has not been previously and finally litigated . . . ." An allegation of

error is deemed to be finally litigated when the Court of Special Appeals has rendered a decision on the merits thereof.

In *Huffington v. State*, 304 Md. 559, 500 A.2d 272 (1985) the Court of Appeals addressed this very issue and affirmed the trial court's ruling. Therefore, this contention is denied.

In contention L the Petitioner asserts that his Constitutional rights were denied by the introduction of testimony referring to Petitioner's prior unrelated drug dealing and that this testimony prejudiced the jury. This contention is denied because it could have been raised on appeal, if appropriately preserved. Since it was not raised on appeal, it is deemed waived.

In contention M the Petitioner states that his Constitutional rights were denied by improper inflammatory statements made by the State during closing argument. Specifically the Petitioner objects to the use in the closing argument of the words of Danny Becker, the four year old son of Diane Becker.

This issue, which was not preserved for appeal and was not addressed on appeal, is deemed waived. Furthermore, since there was testimony elicited during the trial which established the utterance it was not improper for the State to use the statement during closing. In *State v. Calhoun*, 306 Md. 692, 511 A.2d 461 (1986) the Court of Appeals held that Petitioner waived in post conviction proceeding the issue that the prosecutor's closing argument at the guilt/innocence phase was improper where Petitioner failed to object at trial and failed to raise the issue on appeal

In contention N the Petitioner claims that he was denied his right to a speedy trial after the case was remanded for a new trial. Approximately 11 months passed between the date of the remand and the start of the new trial. Mandatory dismissal under Rule 4-271 and *State v. Hicks*, 285 Md. 310, 403 A-2d 256 (1979) only applies to the original trial and not to any subsequent trial under remand from an appellate court.

*Donalds v. State*, 49 Md.App. 106, 430 A.2d 113 (1981). Therefore, this contention is denied.

In contention O the Petitioner contends that his rights were violated because he was convicted on an insufficient indictment and further that he was placed in jeopardy twice for the same offense.

These contentions were addressed by the Court of Appeals in *Huffington v. State*, 304 Md. 559, 500 A.2d 272 (1985) and *Huffington v. State*, 302 Md. 184, 486 A.2d 402 (1985) and are deemed finally litigated and therefore denied.

In contention P Petitioner claims that his Constitutional rights were denied by the trial court's refusal to strike the "Notice of Intention to Seek the Death Penalty." Huffington raised this issue on appeal, *Huffington v. State*, 304 Md.559 at 583-585. The Court of Appeals held that this contention was without merit. Being finally litigated, this contention is denied.

In contention EE the Petitioner claims that he is entitled to relief because the State relied on the testimony of Deno Kanaras, Laurie Nengel and James Brinegar, whose testimony the State believed to be false.

The State denies the use of any testimony which it knew to be false. In its Answer the State argues that it never questioned the veracity of Kanaras' testimony as to Huffington's role in the murders but did question Kanaras' testimony only to the extent that it exculpates his own involvement. Furthermore, the State contends that Kanaras' testimony as to Huffington's commission of the murders is corroborated by other evidence.

The other two witnesses, Brinegar and Nengel both testified at Kanaras' trial and their testimony was accepted by a jury as truthful. The State should be able to use this testimony in subsequent trial of a co-defendant. Therefore, this contention is denied.

In contention II the Petitioner contends that he is entitled to relief because at the trial Earlene Perez testified that Diane Becker's son, Danny, called out the window "Jack Daniels, my mommy's face is bloody." The Petitioner contends that this statement is hearsay and that it should have been excluded. This contention is denied because it is deemed waived in that it was not raised on appeal. Furthermore, the statement under *Nixon v. State*, 2 Md.App. 611, 236 A.2d 304 (1967) is not hearsay in that it was not admitted to prove the truth of the matter asserted, that is that Huffington committed the murder, but rather as an extrajudicial statement admitted for the fact that it was said, not for its truthfulness.

Contention DD and KK are both ineffective assistance of counsel claims. In DD the Petitioner alleges 19 instances of ineffective assistance of counsel and in KK he alleges another 6 instances, for a total of 25.

In order to establish ineffective assistance of counsel the Petitioner must demonstrate that (1) counsel's performance was deficient and (2) that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 2064 (1984), *Harris v. State*, 303 Md. 685, 696, 496 A.2d 1074, 1079 (1985). To prove counsel's deficiency, the Petitioner must identify the acts or omissions that are alleged not to have been the result of reasonable professional judgment and show that the representation did not meet an objective standard of reasonableness, and that trial counsel's omission was not sound trial strategy. *Harris*, 303 Md. 685 at 697, 496 A.2d 1074 at 1080. Proof of prejudice "requires showing that counsel's errors were so serious as to deprive the Defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 697, 104 S.Ct. at 2064. It is not enough for the Defendant merely "to show that the errors had *some conceivable effect* on the outcome of the proceedings, or that the errors *impaired* the presentation of the defense." (Emphasis on original) *Harris*, 303 Md. 685 at 700, 496 A.2d 1074 citing *Strickland*, 466 U.S. at 693, 104 S.Ct. at 2068.

Rather "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result or the proceeding would have been different." *Id.* at 466 U.S. at 694, 104 S.Ct. 2068. The Court of Appeals in *State v. Tichnell*, 306 Md. 428, 509 A.2d 1179 (1986), defined reasonable probability to mean "a probability sufficient to undermine the confidence in the outcome." *Id.* at 441-442, 509 A.2d 1186 (quoting *Strickland*, 466 U.S. at 694, 104 S.Ct. 2068.)

The Court, in *Strickland*, 466 U.S. at 693, 104 S.Ct. 2067, stated that "[r]epresentation is an art, an act or omission that is unprofessional in one case may be sound or even brilliant in another. Even if a defendant shows that particular errors of counsel were unreasonable, therefore the defendant must show that they *actually had* an adverse effect on the defense." (Emphasis added.) An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Id.* at 691, 104 S.Ct. 2066. "In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the Judge or jury." *Id.* at 695, 104 S.Ct. 2069.

In his first subcontention the Petitioner claims that counsel failed to investigate and thereafter present witnesses who would have presented favorable testimony. Even if we assume that there is some merit to this claim, under *Strickland*, this Court must look at the totality of the evidence before the trial judge. The evidence against Huffington was overwhelming and none of the testimony which the Petitioner states would have helped him would be sufficient to overcome the evidence against him. Furthermore, Mr. Alan Drew testified that his trial strategy was to show that the State had the wrong defendant. He further felt that unless Huffington testified that the character evidence, which Huffington now says should have been presented, would have been inadmissable. Drew chose not to have Huffington testify and not to call character witnesses. The Petitioner has not met

the *Strickland* burden on this contention and therefore, it is denied.

In contention 2 the Petitioner states that counsel was ineffective in that he failed to challenge and present evidence of a prosecution prone jury as set forth in contention A. There is no merit in this contention. See contention A. Furthermore, the defense hired experts in the area of jury selection who prepared questionnaires and sent them to every prospective juror. The voir dire lasted over three days. For the reason given in response to contention A and the techniques used by defense counsel at trial, this contention is denied.

In contention 3 the Petitioner claims that defense counsel failed to conduct an adequate voir dire. Petitioner's counsel was not ineffective in their voir dire. In fact, extensive and effective voir dire was conducted. See response to contention A, B and 2. This contention is denied.

In contention 4 the Petitioner claims counsel was ineffective for failure to preserve for appeal the State's Attorney's failing to provide timely discovery, as set forth in contention C, of evidence pertaining to Rassa. For the reasons stated in the denial of contention C, this Court denies contention 4.

In contention 5 the Petitioner claims that counsel was ineffective in failing to assert that the State's Attorney should have been disqualified as set forth in contention E. As stated in the ruling on contention E, there is no credible testimony that the State's Attorney conversed with the defendant regarding the *subject* of his representation. Therefore, Mr. Cassilly would not have to be disqualified. This contention is denied.

In contention 6 the Petitioner alleges that trial counsel was ineffective because he failed to object to prejudicial opening remarks at the guilt/innocence stage as set forth in contention F. For the reasons stated in the response to contention F, this contention is denied. The opening remarks

of the prosecutor were permissable and an objection should have been over-ruled.

In contention 7 the Petitioner claims that counsel was effective in that he failed to object to the improper introduction of inadmissable evidence as described in contentions G, H, I and L. The Petitioner is referring to the introduction of color photographs of the crime victims, the testimony that a child was asleep in close proximity to one of the victims at the time she was murdered, the introduction of the defendant's past drug use and introduction of evidence seized-which was beyond the scope of the warrant. The pictures, the testimony of the whereabouts of child and introduction of the Defendant's past drug experience are admissable. The Defendant, at the post conviction hearing called Mr. Keating as a witness and expert on post convictions. Mr. Keating testified as to the necessity of establishing use of drugs and the profits from selling drugs as a motive for the murders. Objections to the admission of these would have been fruitless.

As to those items of evidence seized, which the Petitioner claims exceeded the scope of the warrant, the Court of Appeals has held that the failure to object to the introduction of certain evidence does not amount to the denial of the right to effective assistance of counsel. *State v. Calhoun*, 306 Md. 692, 511 A.2d 461 (1986), *Smith v. State*, 1 Md.App. 297, 229 A.2d 723 (1967). Furthermore, the Petitioner has failed to show that even if "tainted" evidence had been deemed inadmissable that he would have prevailed, i.e., that this prejudiced his defense to the extent that reversal or a new trial is warranted. Therefore, this contention is denied.

In contention 8 the Petitioner claims that counsel's failure to object to the "improper closing argument" at the trial on the merits constitutes ineffective assistance of counsel. This claim is parallel to claim M and II. Under the reasoning set out in this Court's ruling to claim II, this Court

deems the closing argument to be within acceptable parameters and therefore this contention is denied.

In contention 9 the Petitioner alleges that counsel was ineffective for not challenging the "defective" charging document. The Court of Appeals in *Huffington v. State*, 304 Md. 559, 500 A.2d 272 (1985) at p.586 disposed of this question by stating "Huffington cannot prevail on this issue". Therefore, the contention is denied.

Contentions 10, 11, 12, 13, 14, 15, 16, 17, 18, 22, 23 and 25 are moot in that they concern sentencing and as stated *supra*, a new sentencing hearing must be held.

In contention 19 Petitioner states that counsel was ineffective in that he failed to object to, and present evidence on, and raise as grounds for appeal each and every claim herein, e.g. claims 1-18. This is simply a bold allegation and is over-generalized. Each and every claim herein has been addressed and relief denied thereon, so this claim is denied.

In contention 20 the Petitioner claims that counsel was ineffective in that he failed to adequately impeach the testimony of prosecution witnesses, particularly Deno Kanaras. In *Booth v. Warden* 3 Md.App. 480, 240 A.2d 352 (1967) the Court of Special Appeals held that a complete failure to cross-examine certain witnesses was not sufficient grounds to grant a new trial. The mere fact that there was a conviction does not establish that counsel was ineffective. The Defendant is not entitled to a perfect defense but only a competent defense. The witnesses of which the Petitioner refers were competently cross-examined. Furthermore, under the second prong of *Strickland*, there was sufficient other evidence to convict Huffington.

In contention 21 the Petitioner reiterates contentions M and II and states that counsel's failure to object constitutes ineffective assistance of counsel. For the reasons stated in II this contention is denied. An objection should not have been sustained.

In contention 24 the Petitioner asserts that counsel was ineffective in that he failed to challenge the verdict as based on false testimony. This contention parallels contention EE. The jury is the finder of fact and it was within the jury's perview to decide whether to believe or not believe the testimony. For this reason as well as those stated in EE, this contention is denied.

In all his ineffectiveness of counsel claims, with the exception of those made moot by the granting of a resentencing hearing, the Petitioner has failed to establish either prong of the *Strickland* test. Therefore, all the viable ineffective assistance of counsel claims are denied.

Therefore, upon consideration of John Norman Huffington's Petition for Post Conviction Relief, supplements thereto, memoranda and oral arguments thereon and the response of the State thereto, it is, by the Court, this 8th day of January , 1991,

ORDERED, that the Petition for Post Conviction Relief be and the same is hereby DENIED, with the exception that Petitioner be granted a new Sentencing Hearing.

/s/ G. Edward Dwyer, Jr.
G. Edward Dwyer, Jr.
JUDGE

TRUE COPY TEST:

/s/ Charles C. Keller, CLERK

**APPENDIX J**

**IN THE**
**COURT OF APPEALS OF MARYLAND**

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Misc. No. 38

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September Term, 1990

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JOHN NORMAN HUFFINGTON

v.

STATE OF MARYLAND

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ORDER

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The Court having considered the application for leave to appeal from the partial denial of post-conviction relief in a capital case, and the answer filed thereto, in the above entitled case, it is this 10th day of April, 1991

ORDERED, by the Court of Appeals of Maryland, that the application be, and it is hereby, denied.

/s/ Robert C. Murphy
Chief Judge